

(19,469.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 97.

FRANK COLE BROWN, PLAINTIFF IN ERROR,

vs.

CHARLES DUNCAN GURNEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

INDEX.

Original. Print.

Caption	1	1
Assignment ofors	2	1
Transcript fromct court of Teller county.....	4	2
Caption	5	2
Summons and return	6	3
Order allowing time to answer.....	9	4
Amended complaint.....	10	5
Answer and cross-complaint.....	15	7
Replication	19	9
Order setting time for trial	21	11
Order vacating and resetting same.	22	11
Order consolidating causes 219 and 128.....	24	12
Order allowing submission of case on agreed statement of facts.	24	12
Order taking cause under advisement.....	25	13
Order to enter decree in favor of defendant.....	27	13
Judgment and decree.	28	14
Order allowing appeal	31	15
Appeal bond.....	31	16
Clerk's certificate	35	17

	Original.
Plaintiff's bill of exceptions.....	36
Stipulation to submit <i>Small vs. Brown</i> on the statement of facts in <i>Gurney vs. Brown</i>	37
Agreed statement of facts.....	38
Exhibit A—Decision of Commissioner, May 28, 1895..	49
B—Decision of Commissioner, Sept. 16, 1895..	51
C—Decision of Commissioner, Jan. 8, 1896....	56
Diagram.....	65
D—Decision of Commissioner, Feb. 5, 1896....	66
E—Decision of Acting Secretary, April 7, 1896..	71
Diagram.....	73
F—Decision of Commissioner, Oct. 22, 1897..	74
G—Decision of Secretary, May 7, 1898.....	89
H—Affidavit of Lyman B. Goff.....	101
I—Decision of Commissioner, April 27, 1899..	102
J—Decision of Commissioner, July 31, 1899..	108
K—Decision of Commissioner, July 15, 1898..	113
Diagram.....	119
Judge's certificate to bill of exceptions.....	120
Endorsement on transcript, &c.....	122
Order submitting cause.....	123
Judgment.....	124
Opinion.....	126
Order extending time for filing petition for rehearing.....	139
Petition for rehearing.....	140
Order denying rehearing.....	150
Clerk's certificate.....	151
Assignment of errors.....	152
Petition for writ of error and allowance of same.....	157
Copy of bond for security of costs.....	159
Original writ of error.....	163
Original citation with proof of service or admission thereof.....	165
Return to writ of error.....	166

No. 4445.

In the Supreme Court of the State of Colorado.

Pleas before the honorable the supreme court of the State of Colorado, sitting at Denver, in said State, at a term thereof begun and held at the capitol building, in said city, on the second Monday of September, A. D. 1901, and of the Independence of the United States the one hundred and twenty-fifth.

Present: Hon. John Campbell, chief justice, Hon. William H. Gabbert, Hon. Robert W. Steele, justices, Hon. Chas. C. Post, Esq., attorney general, Felix A. Richardson, Esq., bailiff, and Horace G. Clark, clerk.

Be it remembered, that heretofore and on to-wit: the 10th day of January, A. D. 1902, there were filed in the office of said clerk of said supreme court a certain transcript of record, bill of exceptions and assignment of errors; and contained in and made a part of said transcript of record, bill of exceptions and assignment of errors were writings in words and figures as follows, to-wit:

In the Supreme Court of the State of Colorado.

CHARLES DUNCAN GURNEY, Appellant, }
vs. } No. —.
F. C. BROWN, Appellee.

Appeal from the District Court of Teller County.

Assignment of Errors.

Comes now appellant in the above entitled cause, by his attorneys, and alleges:

That at the trial of said cause sundry errors were committed whereby his interests were sacrificed, to his grievous wrong and injury, and that the following, among other errors and grounds of complaint in this regard, exist in connection with said trial, to-wit:

First. The findings and judgment of the court are unsupported by the evidence.

Second. The findings and judgment of the court are contrary to the weight of evidence.

Third. The findings and judgment of the court are against the law.

Fourth. The court erred in rendering judgment for defendant and not for plaintiff upon the whole record.

Wherefore, appellant prays that the said judgment and decree be reversed, and that a judgment in favor of appellant be ordered by this honorable court.

J. C. HELM AND
CHARLES C. BUTLER,
Attorneys for Appellant.

Endorsed: No. 4445. In the supreme court of the State of Colorado. Charles Duncan Gurney, appellant, vs. F. C. Brown, appellee. Assignment of errors. Filed in supreme court Jan. 10 1902. Horace G. Clark, clerk. J. C. Helm, attorney for — Equitable building, Denver, Colo.

In the District Court, Teller County.

CHARLES DUNCAN GURNEY, Plaintiff, }
versus } No. 219.
 F. C. BROWN, Defendant.

UNITED STATES OF AMERICA.

STATE OF COLORADO, }
 County of Teller, } ss:

In the District Court.

Pleas before the Honorable Edward C. Stimson, one of the judges of the district court of the fourth judicial district of the State of Colorado within and for the county of Teller, at a term of court thereof begun and held at the court house, in the city of Cripple Creek, county and State aforesaid, on the eleventh day (it being the second Monday) of September, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

Present: Honorable Edward C. Stimson, judge; Henry McAllister, Jr., district attorney; James T. Stewart, sheriff of said county; F. E. Boynton, clerk of said court.

Attest:

F. E. BOYNTON, Clerk,
 By E. K. GAYLORD, Deputy.

Be it remembered, that thereafter and on to-wit, the 14th day of October, A. D. 1899, there was filed in the office of the clerk of said court a certain summons, which was in the words and figures following, to-wit:

FRANK COLE BROWN VS. CHARLES DUNCAN GURNEY.

STATE OF COLORADO, } ss:
County of Teller,

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff,
versus
F. C. BROWN, Defendant. } Summons.

The People of the State of Colorado to F. C. Brown, the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff, in the district court of Teller county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint, and if a copy of the complaint in the above entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinabove specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid. The said

7 action is brought by the plaintiff to obtain judgment against you for the recovery of possession of that portion of the Hobson's Choice Lode mining claim situate in the Cripple Creek mining district, Teller county, Colorado, which is in conflict with the Scorpion Lode mining claim, Sur. No. 12641; for the sum of \$2,500 damages for the detention thereof; for the sum of \$125.00 expended in support of this adverse claim; for costs of suit, and for such other and further relief as to the court may seem meet and proper as will more fully appear from the complaint in said action, to which reference is here made; and a copy of which is hereto attached.

And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will apply to the court for the relief therein demanded.

Given under my hand and the seal of said court, at Cripple Creek, in said county, this 16th day of September, A. D. 1899.

[SEAL.]

F. E. BOYNTON, Clerk.

STATE OF COLORADO, } ss:
County of Teller,

I do hereby certify that I have duly served the within summons, together with a copy of the complaint in the within stated action, on this 28th day of September A. D. 1899, by delivering to and leaving with F. C. Brown, the said defendant personally,

in the county of Teller, a copy of the said summons, together with a copy copy of the complaint in the action therein mentioned, thereto attached.

JAMES T. STEWART, Sheriff,
By MATT DEERING, Deputy.

8 Endorsed: No. 219—Summons, In district court, Teller county, Charles Duncan Gurney, plaintiff,—*vs.*—F. C. Brown, defendant. State of Colorado, county of Teller, *ss.* Office of the sheriff of said county, Sept. 28th A. D. 1899. I hereby certify that I received the within summons on the 28th day of September, 1899, at 11 o'clock a. m. James T. Stewart, sheriff, by J. D. Harrigan, undersheriff. Filed in the district court of Teller county, Colorado, Oct 14, 1899, F. E. Boynton, clerk.

9 Be it remembered, that thereafter and on to-wit the 18th day of November, A. D. 1899, the same being one of the regular juridical days of the September, A. D. 1899 term of said court, the following proceedings, *inter alia*, were had and done, to-wit:

CHARLES DUNCAN GURNEY, Plaintiff,	} Order.
<i>vs.</i> F. C. BROWN, Defendant.	

At this day in open court comes said plaintiff by Jones & Butler, Esqs., his attorneys, and the said defendant by Glidden & McCarthy, Esqs., his attorneys, also comes. Thereupon this cause coming on to be heard upon the demurrer of said defendant to the complaint of plaintiff herein, the same is argued by counsel and submitted to the court, and the court being now sufficiently advised in the premises doth sustain said demurrer and orders that time and until ten days from and after this day be and is hereby allowed to said plaintiff within which to file and amend complaint herein and time and until ten days after receiving service by copy of such amended complaint is hereby allowed to said defendant within which to plead thereto.

10 Be it remembered, that thereafter and on to-wit the 28th day of November, A. D. 1899, there was filed in the office of the clerk of said court a certain amended complaint, which is in the words and figures following, to-wit:—

STATE OF COLORADO, } ss:
County of Teller,

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff, }
vs. } Amended Complaint.
F. C. BROWN, Defendant.

The plaintiff complains of the defendant and alleges:

1st. That on the 23rd day of June, 1898, and ever since hitherto the plaintiff was and still is the owner and in the actual occupation and possession of the "Hobson's Choice" Lode mining claim, situate in the Cripple Creek mining district, in the county of Teller (formerly the county of El Paso), and State of Colorado.

2nd. That at and before the date last mentioned the plaintiff has declared his intention to become a citizen of the United States before a court of record, to-wit: the superior court of the county of Los Angeles, in the State of California.

3rd. That on the said 23rd day of June, 1898, the plaintiff, who is over the age of twenty-one years, under and by virtue of the laws of the United States governing the discovery and location of lode mining claims, entered upon the unoccupied and unappropriated public domain of the United States and discovered the "Hobson's Choice" Lode mining claim in the Cripple Creek mining district, in the county of Teller (then the county of El Paso) and State of Colorado, and thereafter, and within three months from the date of his said discovery, and on, to-wit the 29th day of June, 1898, he recorded his said claim in the office of the recorder of the said El Paso county by a location certificate which contained the name of the lode, to-wit "Hobson's Choice," the name of its locator, to-wit the said "Chas. D. Gurney, the date of the location, to-wit, June 23rd, 1898," the number of feet claimed on each side of the discovery shaft, to-wit 633.7 feet running N. 15° 45' E. from center of said discovery shaft, and 80 feet running S. 15° 55' W. from center of discovery shaft," and such a description of the lode as should identify the claim with reasonable certainty to-wit: "Beginning at corner No. 1 whence cor. No. 4 sur. No. 8612 Fortuna lode bears N. 18° 11' E. 47.35 feet, thence N. 86° 49' W. 275.99 ft. to cor. No. 2 thence N. 15° 45' E. 713.7 ft. to cor. No. 3 thence S. 86° 49' E. 307.32 ft. to cor. No. 4; thence S. 18° 11' W. 721.16 ft. to cor. No. 1, the place of beginning;" and before filing such location certificate and within sixty days from the date of his discovery, to-wit, on June 29th, 1898, he located his said claim by sinking a discovery shaft upon the said lode to the depth of more than ten feet from the lowest part of the rim of said shaft at the surface, uncovering, exposing, and disclosing a well defined crevice with mineral rock in place.

12 Second by posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of its locator, and the date of the discovery; and third, by marking the surface boundaries of said claim by six (6) substantial posts, hewed on the sides set in toward the claim, and sunk into the ground, to-wit, one at each corner and one at the center of each side line.

4th. The plaintiff has and claims the legal right to occupy and possess said "Hobson's Choice Lode mining claim, and to be entitled to the possession thereof by virtue of a full compliance by himself with the laws of the United States, and those of the State of Colorado, by location and pre-emption and by possession as a lode mining claim, located on the public domain of the United States.

5th. That on or about the 14th day of May, 1898, the defendant wrongfully, and whilst the same did not form part of the unoccupied and unappropriated public domain, entered upon mineral land which now forms a part of the said "Hobson's Choice" Lode claim, to-wit, all that portion of the said Hobson's Choice" Lode claim which is intersected by the exterior lines of sur. No. 12641, known as the Scorpion lode, as shown by the plat, marked "Exhibit B," filed in the land office of the United States at Pueblo, Colorado, on the 17th day of August, 1899, by the plaintiff with his protest and adverse claim against the entry by the defendant of said Scorpion lode sur. No. 12641, for patent said ground so intersected being described as follows:—

Beginning at cor. No. 2, sur. No. 12641, Scorpion lode, thence S. 86° 47' E. 279.09 ft.; thence S. 18° 11' W. 682.67 ft.; thence
13 S. 20° 40' W. 13.91 ft.; thence S. 88° 52' W. 125.21 ft.; thence N. 86.49' W. 153.68 ft.; thence N. 15° 45' E. 384.2 ft.; thence N. 20° 40' E. 321.99 ft. to place of beginning.

6th. That on the 19th day of June, 1899, the defendant made application to the said United States land office at Pueblo, Colorado, for a patent for the said Scorpion Lode claim as described in the plat and field notes on file in that office as survey number 12641 and published his said application in a weekly newspaper published in the said county of Teller and known as the Weekly Tribune," the first publication appearing in the issue of the said newspaper of the 24th day of June, 1899.

That the plaintiff, during the period of such publication, and to-wit, on the 17th day of August 1899 filed his protest and adverse claim against the entry by the defendant of the said "Scorpion" Lode claim for patent, and within thirty days from the filing of the said adverse claim commenced the present proceedings in support of his said adverse claim.

7th. That the defendant has ever since hitherto wrongfully withheld possession of said parcel of said "Hobson's Choice" Lode mining claim from the plaintiff, to his damage in the sum of two thousand five hundred dollars.

8th. That this suit is brought in support of said adverse claim

and that plaintiff necessarily disbursed, expended and laid out the sum of seventy-five dollars for plats, abstracts, and copies of papers filed in said land office with his said adverse claim, and also a reasonable counsel's fee of fifty dollars for the expense of preparing his said adverse claim.

14 Wherefore, plaintiff prays and demands judgment against the defendant;

First. For the recovery of possession of said described parcel of said "Hobson's Choice" Lode mining claim.

Second. For the sum of two thousand five hundred dollars damages for the detention thereof.

Third. For the sum of one hundred and twenty-five dollars expended in support of said adverse claim.

Fourth. For costs of suit.

Fifth. For such further and other relief as to the court may seem meet and proper.

JONES & BUTLER,
Attorneys for the Plaintiff.

Endorsed: 219. In the district court, Charles Duncan Gurney, plaintiff,—*vs.*—F. C. Brown, defendant. Amended complaint. Filed in the district court of Teller county, Colorado, Nov. 28, 1899, F. E. Boynton, clerk by E. K. Gaylord, deputy.

15 Be it remembered, that thereafter and on to-wit the 13th day of January, A. D. 1900, there was filed in the office of the clerk of said court a certain answer and cross-complaint, which is in the words and figures following, to-wit:

STATE OF COLORADO, }
County of Teller, } ss:

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff, }
vs. } No. 219. Answer and Cross-
F. C. BROWN, Defendant. } complaint.

Comes now the defendant above named by Glidden & McCarthy his attorneys, and for answer to the amended complaint of the plaintiff herein denies each and every allegation matter and thing in said complaint alleged and contained.

And for a further and second answer and defense and as a cross complaint herein, the defendant alleges:

1. That on the 13th day of May, 1898, the defendant F. C. Brown, being at that date and ever since remaining a citizen of the United States and over the age of 21 years, entered upon the vacant, unappropriated and unoccupied public mineral domain of the United

States, in the Cripple Creek mining district, in that portion of the county of El Paso, which is now within and a part of the county of Teller, and State of Colorado, and then and there discovered
16 thereon a well defined vein or lode of valuable mineral bearing rock and located the same as a lode mining claim, 728 feet in length and 300 feet in width and called and named the Scorpion Lode mining claim.

2. That at the time of the said discovery the defendant posted at the point thereof a plain sign or notice, containing the name of the lode, to-wit: the Scorpion; the date of discovery, to-wit, the 13th day of May, 1898; and the name of the discoverer, to-wit: the said F. C. Brown. And thereafter and within sixty days from the date of said discovery, the said defendant sunk or caused to be sunk at the point of such discovery a discovery shaft upon such lode or vein, to a depth of more than ten feet below the lowest part of the rim thereof at the surface; and in such shaft and at such depth discovered and disclosed a well defined vein or crevice of rock in place bearing gold, silver and other precious metals in appreciable quantities; and said defendant did then and there mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground, one at each corner and one at the center of each side line of said claim; and did then and there mark said posts on the sides in toward the claim with the inscription denoting the respective corners of said claim.

3. That thereafter and within three months from the date of such discovery the defendant did file or cause to be filed with the clerk and recorder of the county of El Paso, in which county said premises were on such date located, a certificate of location of said claim,
17 containing the name of the claim, to-wit: the Scorpion; the name of the locator, to-wit, F. C. Brown; the date of location, to-wit, the 13th day of May, 1898; the number of feet in length claimed along the vein on each side of the center of said discovery shaft, to-wit, 712 feet northerly and 16 feet southerly; and the general course and direction of said vein or lode, together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty; which said location certificate now appears of record in the office of the clerk and recorder of said county of El Paso and State of Colorado.

4. That the defendant now claims ownership and the right to occupy and possess the said Scorpion Lode mining claim under and by virtue of a prior discovery, location, possession and appropriation of said lode mining claim while the same was part and parcel of the unoccupied and unappropriated public mineral domain of the United States, and under and by virtue of a full and complete compliance with each and every of the laws of the State of Colorado, and of the United States governing the discovery, location and appropriation of lode mining claims upon the public mineral domain of the United States within the Cripple Creek mining district, in

the said county of Teller (formerly a part of El Paso county) Colorado, including as well the performance thereon of not less than one hundred dollars' worth of work, labor and improvements during each and every calendar year.

5. That under and by virtue of the premises the defendant is the owner and occupant and has good right to occupy and possess each and every part and parcel of said area and territory

18 included within the exterior surface boundaries of the aforesaid Scorpion Lode mining claim, including as well the premises sued for by plaintiff as the same are mentioned and described in the plaintiff's complaint herein.

Wherefore, the defendant prays judgment that the complaint of the plaintiff herein be dismissed; that the defendant do have and recover of and from plaintiff herein all his costs and disbursements in this behalf expended; and for such other and further judgment, order or relief as may be just and equitable.

GLIDDEN & McCARTHY,
Defendant's Attorneys.

Service of a copy of the above answer and cross complaint admitted this 13th day of Jan'y, 1900.

JONES & BUTLER,
Plaintiff's Att'ys.

Endorsed: No. 219—State of Colorado, county of Teller, ss. In the district court. Charles Duncan Gurney, plaintiff vs. F. C. Brown, defendant. Answer and cross complaint—Filed in the district court of Teller county, Colorado, Jan. 13, 1900. F. E. Boynton, clerk, W. E. Foley, deputy.

19 Be it remembered, that thereafter and on to-wit the 23rd day of January, A. D. 1900, there was filed in the office of the clerk of said court a certain replication, which is in the words and figures following to-wit:

STATE OF COLORADO, } ss:
County of Teller, }

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff, }
vs. } No. 219. Replication.
F. C. BROWN, Defendant.

Comes now the plaintiff, by Jones & Butler, his attorneys, and for replication to the second answer and defense and cross complaint herein, denies each and every allegation, matter and thing in said second answer and defense and cross complaint alleged.

JONES & BUTLER,
Attorneys for Plaintiff.

Endorsed: 219. In the district court, Teller county. Charles D. Gurney, vs. F. C. Brown, Replication, Filed in the district court of Teller county, Colorado, Jan. 23, 1900. F. E. Boynton, clerk, W. E. Foley, deputy.

STATE OF COLORADO, }
County of Teller, } ss:

In the District Court.

Pleas before the Honorable Louis W. Cunningham, one of the judges of the district court of the fourth judicial district of the State of Colorado within and for the county of Teller, at a term of court thereof begun and held at the court house in the city of Cripple Creek, county and State aforesaid, on the sixth day (it being the first Monday) of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

Present: Honorable Louis W. Cunningham, judge aforesaid; Henry Trowbridge, Esq., district attorney; James T. Stewart, sheriff of said county; A. W. Grant, clerk of said court.

Present: A. W. Grant, clerk, by W. E. Foley, deputy.

Be it remembered, that thereafter and on to-wit the 6th day of May, A. D. 1901, the same being one of the regular juridical days of the May, A. D. 1901 term of said court, the following proceedings, *inter alia*, were had and done, to wit:

STATE OF COLORADO, } ss:
County of Teller, }

In the District Court.

Pleas before the Honorable Louis W. Cunningham, one of the judges of the district court of the fourth judicial district of the State of Colorado within and for the county of Teller, at a term of court thereof begun and held at the court house, in the city of Cripple Creek, county and State aforesaid, on the 6th day (it being the first Monday) of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

Present: Honorable Louis W. Cunningham, judge aforesaid; Henry Trowbridge, Esq., district attorney; James T. Stewart, Esq., *district attorney*; A. W. Grant, clerk of said court.

Attest:

A. W. GRANT, Clerk,
By W. E. FOLEY, Deputy.

Be it remembered, that thereafter and on to-wit: the 15th day of June, the same being one of the regular juridical days of May, A. D. 1901 term of said court, the following proceedings, *inter alia*, were had and done, to-wit:

24 CHARLES DUNCAN GURNEY, Plaintiff, }
vs. } 219. Order.
F. C. BROWN, Defendant.

At this day in open court come said parties by their attorneys respectively.

Therefore, by consent of the parties herein, it is ordered that cause No. 128 of the civil docket in this court be and the same is hereby consolidated with this cause for the purpose of trial.

CHARLES DUNCAN GURNEY, J. A. SMALL, Plain-
tiff,
vs.
F. C. BROWN, Defendant. } 219-128. Order.

At this day in open court come said parties by their attorneys, respectively. Thereupon this cause coming on for trial before the court, a jury being expressly waived, the same is submitted to the court upon an agreed statement of facts. Thereupon comes the argument of counsel which is continued until the 27th day of June, A. D. 1901.

25 Be it remembered, that thereafter, and on to-wit the 27th day of June, A. D. 1901, the same being one of the regular juridical days of the May, A. D. 1901 term of said court, the following proceedings, *inter alia*, were had and done, to-wit:—

CHARLES DUNCAN GURNEY, J. A. SMALL, Plain- tiff, vs. F. C. BROWN, Defendant.	}	128-219. Order.
---	---	-----------------

At this day in open court come said parties by their attorneys respectively.

Thereupon this cause coming on to be heard upon the continued argument of the parties hereto, it is ordered that the parties continue their argument herein by brief, and the court doth take said cause under advisement.

26 UNITED STATES OF AMERICA.

STATE OF COLORADO, } ss:
County of Teller, }

In the District Court.

Pleas before the Honorable Louis W. Cunningham, one of the judges of the district court of the fourth judicial district of the State of Colorado, sitting within and for the county of Teller, at a term of court thereof begun and held at the court house, in the city of Cripple Creek, county and State aforesaid, on the 9th day (it being the second Monday) of September, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-sixth.

Present: Honorable Louis W. Cunningham, judge aforesaid; Henry Trowbridge, Esq., district attorney; James T. Stewart, Esq., sheriff of said county A. W. Grant, Esq., clerk of said court.

Attest:

A. W. GRANT, Clerk,
By W. E. FOLEY, Deputy.

Be it remembered, that thereafter and on to-wit: the 16th day of September, A. D. 1901, the same being one of the regular juridical days of the September A. D. 1901 term of said court, the following proceedings, *inter alia*, were had and done, to-wit:—

27 CHARLES DUNCAN GURNEY, Plaintiff, vs. F. C. BROWN, Defendant.	}	219. Order.
--	---	-------------

At this day in open court come said parties by their attorneys respectively: Thereupon, this cause having been heretofore submitted

to the court upon the agreed statement of facts of the parties hereto, and the court having heard all of the arguments of counsel and having fully considered the briefs of the parties hereto, and being now sufficiently advised in the premises, doth find the issues herein joined in favor of the defendant F. C. Brown, and it is ordered that a decree be entered herein in accordance with the finding of the court in this behalf in favor of the said defendant and against the said plaintiff, and that the same be recorded in the judgment book.

To which finding and judgment of the court the plaintiff duly excepts.

28 STATE OF COLORADO, }
 County of Teller, } ss:

In the District Court.

CHARLES DUNCAN GURNEY, Plain- tiff, vs. F. C. BROWN, Defendant.	}	No. 219. Judgment and Decree.
--	---	-------------------------------

On this 15th day of June, A. D. 1901, the same being the 41st day of the regular May term of said court in the year 1901, the above cause came regularly on for trial upon the merits, and the plaintiff, Charles Duncan Gurney being present in person and by his attorneys J. C. Helm and C. C. Butler, and the defendant, F. C. Brown, being present in person and by his attorney T. F. McCarthy, and both parties having announced themselves ready for trial, and a trial by jury having been expressly waived, the trial of said cause was thereupon begun at the court house, in the city of Cripple Creek, Teller county, Colorado, on said date before the Honorable Louis W. Cunningham, one of the judges of said court; and the plaintiff and the defendant herein having submitted their evidence herein by the agreed statement of facts, in writing, filed herein and by documentary evidence therein contained, and both the plaintiff and the defendant having rested, the introduction of evidence herein was thereupon closed; and the court having heard the argument of J. C. Helm, one of the attorneys for the plaintiff herein, the further hearing of said cause was thereupon continued.

29 And on this 27th day of June, A. D. 1901, being the 53rd day of the regular May term of said court, in the year 1901, the above cause came regularly on again for hearing, in pursuance of such continuance before the Honorable Louis W. Cunningham, one of the judges of said court, at the court house in the city of Cripple Creek, Teller county, Colorado, and the plaintiff being present in person and by his attorney, and the defendant being present in person and by his attorney, and both parties hereto having announced themselves ready, and the court having heard the argument of defendant's attorney, and the argument of C. C. Butler, one of the attorneys for the plaintiff in reply thereto, took the said cause under advisement.

And the said court being now sufficiently advised in the premises,
Doth find the issues herein joined for the defendant, F. C. Brown;
and

Doth further find that the defendant F. C. Brown has established his right and title to and is entitled to the possession and occupancy of all the ground in controversy herein, to-wit: all of the conflict area between the Hobson's Choice Lode mining claim, claimed by the plaintiff herein, and the Scorpion Lode mining claim, U. S. mineral survey No. 12641, owned by the defendant herein, by reason of the full compliance with all and singular the acts of Congress and the statutes of the State of Colorado relating to the discovery, location and appropriation of lode mining claims upon the public mineral domain of the United States.

30 And thereupon it is ordered, adjudged and decreed that the defendant, F. C. Brown do have and recover of and from the plaintiff, Charles Duncan Gurney all of the area and territory in conflict between the plaintiff's so-called Hobson's Choice Lode mining claim and the defendant's Scorpion Lode mining claim, U. S. mineral survey No. 12641 in the Cripple Creek mining district, Teller county, Colorado, such conflict area being more particularly described as follows, to-wit:—

Beginning at cor. No. 2 sur. No. 12641, Scorpion lode Thence S. 86 deg. 47 min. E. 279.09 ft.; thence S. 18 deg. 11 min. W. 682.67 ft.; thence S. 20 deg. 40 min. W. 13.91 ft.; thence S. 88 deg. 52 min. W. 125.21 ft.; thence N. 86° 49' min. W. 153.68 ft.; thence N. 15 deg. 45 min. E. 384.2 ft. Thence N. 20 deg. 40 min. E. 321.99 ft. to place of beginning.

It is further ordered, adjudged and decreed, that the defendant do have and recover of and from the plaintiff his costs in this behalf expended.

Dated this — day of — A. D. 1901.

By the court:

— — —, Judge.

Endorsed: 219—Filed in the district court of Teller county, Colorado, Sept. 16, 1901, A. W. Grant, clerk, by H. P. Seeds, deputy.

31 CHARLES DUNCAN GURNEY, Plaintiff, }
vs. } 219. Order.
F. C. BROWN, Defendant.

At this day in open court comes said plaintiff by his attorney, Charles C. Butler, Esq., and prays an appeal herein to the supreme court of the State of Colorado, which is allowed upon condition that plaintiff give within twenty days from this date a good and sufficient bond in the penal sum of two hundred and fifty dollars, with surety or sureties to be approved by the clerk of this court; and it is ordered that time and until sixty days from this date be and the same is hereby allowed within which to prepare and tender

to the Honorable Louis W. Cunningham, one of the judges of this district court, his bill of exceptions by him reserved herein, and when signed and sealed by said judge, shall be filed herein as of this day.

Be it remembered, that thereafter and on to-wit: the 4th day of October, A. D. 1901, there was filed in the office of the clerk of said court a certain appeal bond, which is in the words and figures following, to-wit:

Know all men by these presents, that we, Charles Duncan Gurney — — of the county of Teller and State of Colorado, are
 32 held and firmly bound unto F. C. Brown in the penal sum of two hundred and fifty dollars, lawful money of the United States, for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at — — this — day of October, in the year of our Lord, one thousand nine hundred and one.

The condition of the above obligation is such, that whereas, the said F. C. Brown did, on the — day of September, one thousand nine hundred and one, at a term of the district court then being holden within and for the fourth judicial district in the county of Teller and State of Colorado, obtain a judgment against the above bounden Charles Duncan Gurney for possession of certain real property in adverse suit, and costs of suit, from which judgment the said Charles Duncan Gurney has prayed for and obtained an appeal to the supreme court of said State of Colorado.

Now if the said Charles Duncan Gurney shall duly prosecute said appeal, and shall moreover pay the amount of the said judgment, costs interest and damages rendered and to be rendered against said Charles Duncan Gurney in case the said judgment shall be affirmed in the said supreme court, or said appeal be dismissed for any reason, than the above obligation to be null and void; otherwise, to remain in full force and virtue.

CHAS. DUNCAN GURNEY. {SEAL}
 JOSEPH STANLEY JONES. {SEAL}
 A. A. ROLLESTONE. {SEAL}

33 STATE OF COLORADO, }
 Teller County, } ss:

Personally appeared this day before me, Clinton S. Harley, of Teller county, A. A. Rolleston, of the county and State aforesaid, one of the securities on the bond of Chas. Duncan Gurney, who, being duly sworn, deposes and says that he is seized and possessed in his own right, over and above all just debts and liabilities, in property not exempt by law from levy and sale under execution of a clear, unincumbered estate of the value of two hundred and fifty dollars within the jurisdiction of this State.

Subscribed and sworn to before me, this 1st day of October, A. D. 1901.

My commission expires August —, 1903.

[SEAL.]

CLINTON S. HARLEY, Notary.

STATE OF COLORADO, }
El Paso County. }

Personally appeared this day before me, Chas. E. Oehler, notary public of El Paso county, Joseph Stanley Jones of the county and State aforesaid, one of the securities on the bond of Charles D. Gurney, who, being duly sworn, deposes and says that he is seized and possessed in his own right over and above all his just debts and liabilities, in property not exempt by law from levy and sale under execution of a clear, unincumbered estate of the value of two hundred and fifty dollars within the jurisdiction of this State.

JOSEPH STANLEY JONES.

Subscribed and sworn to before me, this 2nd day of October, A. D. 1901.

My commission expires April 10, 1905.

CHAS. E. OEHLER,

Notary Public.

[SEAL.]

Endorsed: 219. Appeal bond—dist. court, Teller county, to supreme court, C. D. Gurney vs. F. C. Brown, Approved and filed in the district court of Teller county, Colorado, Oct. 4, 1901. A. W. Grant, clerk, by W. E. Foley, deputy.

35 STATE OF COLORADO, } ss:
County of Teller, }

In the District Court.

I, A. W. Grant, clerk of the district court of the fourth judicial district of the State of Colorado, within and for the county of Teller, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain summons, amended complaint, answer and cross-complaint, replication, judgment and decree, appeal bond, and all orders of court had and entered of record in a certain cause in said district court lately pending, wherein Charles Duncan Gurney was plaintiff, and F. C. Brown was defendant, as the same appear of record and on file in my office remaining.

I do further certify, that the attached bill of exceptions, is the original bill of exceptions filed in my office on the 16th day of December, A. D. 1901.

In witness whereof, I have hereunto placed my hand and affixed the seal of said court, at my office in the city of Cripple Creek, county and State aforesaid, this 19th day of November, A. D. 1901.

[SEAL.]

A. W. GRANT, Clerk.

Plff's costs \$17.45

Def't's costs, 5.20

3—97

36 STATE OF COLORADO, } ss:
County of Teller, }

In the District Court of the Fourth Judicial District,

CHARLES DUNCAN GURNEY, Plaintiff, }
vs. } No. 219.
F. C. BROWN, Defendant.

Plaintiff's Bill of Exceptions.

Be it remembered that this cause coming on for trial before the Honorable Louis W. Cunningham, one of the judges of the district court of the fourth judicial district of the State of Colorado, at the May, A. D. 1901 term of said court, on, to-wit: the 15th day of June, A. D. 1901, without the intervention of a jury, a jury by consent of the parties hereto being hereby expressly waived, said cause is submitted to the court upon the following agreed statement of facts and exhibits offered in connection therewith:

37 STATE OF COLORADO, } ss:
County of Teller, }

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff, }
vs. } No. 219. Stipulation.
F. C. BROWN, Defendant.

It is stipulated and agreed by and between the parties hereto as between themselves, and by and between the parties hereto and the plaintiff and defendant in a certain suit, No. 128 pending in this court, in which J. A. Small is plaintiff and F. C. Brown is defendant, that the above entitled cause and said suit of Small v. Brown shall be submitted to the court on the same agreed stipulation and statement of facts for judgment upon the merits, a copy of which said stipulation and statement of facts, duly signed by the parties hereto, is filed herewith.

**J. C. HELM AND
JONES & BUTLER,**
Attorneys for Plaintiff.

T. F. McCARTHY,
Attorney for Defendant.

JOHN KNOWLES,
Attorney for Plaintiff in Small v. Brown.

T. F. McCARTHY,
Attorney for Defendant in Small v. Brown.

38 STATE OF COLORADO, }
County of Teller, } ss :

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff, }
vs. } No. 219. Stipulation.
F. C. BROWN, Defendant. }

It is hereby stipulated and agreed, that for the purpose of the trial of this case, the following facts are true, and they may be considered as having been established by competent evidence. It is further stipulated that this case shall be submitted to the court, a jury being hereby expressly waived, on the following statement of facts, to-wit:

1. That on the 28th day of May, 1895, the Commissioner of the General Land Office rendered a decision, of which a certified copy is hereto attached and marked "Exhibit A."

2. That on the 16th day of September, 1895, the Commissioner of the General Land Office rendered a decision, a copy of which is hereunto annexed and marked "Exhibit B."

3. That on the 8th day of January, 1896, the Commissioner of the General Land Office rendered a decision, of which a certified copy is hereunto annexed and marked "Exhibit C."

4. That on the 5th day of February, 1896, the Commissioner of the General Land Office rendered a decision, of which a certified copy is hereunto annexed, and marked "Exhibit D."

39 5. That on the 7th day of April, 1896, the acting Secretary of the Interior (John M. Reynolds) rendered a decision, of which a certified copy is hereunto annexed and marked "Exhibit E."

6. That on the 22nd day of October, 1897, the Commissioner of the General Land Office rendered a decision, of which a copy is hereunto annexed, and marked "Exhibit F."

7. That on the 7th day of May, 1898, the Secretary of the Interior (C. N. Bliss) rendered a decision, of which a certified copy is hereunto annexed and marked "Exhibit G."

8. That on the 13th day of May, 1898, defendant, being at that date and ever since remaining a citizen of the United States, and over the age of 21 years, entered upon the land in question, herein-after particularly described, and then and there discovered thereon a well-defined vein or lode of valuable mineral-bearing rock, and located the same as a lode mining claim, 728 feet in length and 300 feet in width, and called and named the same the Scorpion Lode mining claim.

9. That at the time of the said discovery the defendant posted at the point thereof a plain sign or notice, containing the name of the lode, to-wit: the Scorpion; the date of discovery, to-wit: the 13th day of May, 1898; the name of the discoverer, to-wit: F. C. Brown;

and thereafter, and within 60 days from the date of said discovery, the said defendant sunk or caused to be sunk at the point of such discovery a discovery shaft upon such lode or vein to a depth of more than ten feet below the lowest part of the rim thereof at the surface; and in such shaft and at such depth discovered and disclosed a well-defined vein or crevice of rock in place bearing
40 gold, silver and other precious metals in appreciable quantities, and said defendant did then and there mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground, one at each corner and one at the center of each side line of said claim; and did then and there mark said posts on the sides in toward the claim with the inscription denoting the respective corners of said claim.

10. That thereafter, and within three months from the date of such discovery the defendant did file or cause to be filed with the clerk and recorder of the county of El Paso, in which said county said premises were on such date located, a certificate of location of such claim, containing the name of the claim, to-wit: the Scorpion; the name of the locator, to-wit: F. C. Brown; the date of location, to-wit: the 13th day of May, 1898; the number of feet in length claimed, along the vein on each side of the center of said discovery shaft, to-wit: 712 feet northerly and 16 feet southerly; and the general course and direction of said vein or lode, together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty; which said location certificate now appears of record in the office of the clerk and recorder of said county of El Paso and State of Colorado.

11. That on the 15th day of July, A. D. 1898, the defendant F. C. Brown, made an amended location of said lode claim, and on said date made an amended location certificate thereof, containing the name of the claim, to-wit: the Scorpion; the name of the
41 locator, to-wit: F. C. Brown, the date of the amended location, to-wit: July 15th, 1898; the number of feet in length claimed along the vein, to-wit: 693 feet running north 20° 40' east and 25 feet running south 20° 40' west from the discovery shaft thereof, and surface ground 300 feet in width; together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the claim with reasonable certainty; which said location certificate was, on said 15th day of July, A. D. 1898, filed for record and recorded in Book 6, page 48, in the office of the clerk and recorder of said county of El Paso and State of Colorado.

12. That on the 16th day of July, A. D. 1898, the defendant F. C. Brown made an amended location of said lode claim, and on said date made an amended location certificate thereof, containing the name of the claim, to-wit: the Scorpion; the name of the locator, to-wit, F. C. Brown, the date of amended location, to-wit: July 16th, 1898; the number of feet in length claimed along the vein to-wit: 693 feet running north 20° 40' east and 25 feet running south 20° 40'

west from the discovery shaft thereon, and surface ground 300 feet in width; together with such a description of said claim, with reference to natural objects and permanent monuments as would serve to identify the claim with reasonable certainty; which said location certificate was, on said 16th day of July, A. D. 1898, filed for record and recorded in Book 6, page 49, in the office of the clerk and recorder of said county of El Paso, and State of Colorado.

13. That the defendant has fully and completely complied with each and every of the laws of the State of Colorado, and of the United States, governing the discovery and location of lode mining claims within the Cripple Creek mining district, aforesaid; provided, however, that it is not admitted that at the time of said locations the ground embraced in said location was a part of the vacant and unappropriated public domain. And further, it is admitted that during each and every calendar year since the said discovery and location of the Scorpion claim not less than one hundred dollars' worth of work and labor and improvements have been done and made by defendant, in respect of and to hold such claim.

14. That on the 14th day of June, 1898, the Cripple Creek Gold Mining Company, by its president, filed in the General Land Office an instrument dated June 10th, 1898, of which a copy is hereunto annexed and marked "Exhibit H."

15. That on the 23rd day of June, 1898, the plaintiff had declared his intention to become a citizen of the United States before a court of record, to wit: the superior court of the county of Los Angeles in the State of California.

16. That on the said 23rd day of June, 1898, the plaintiff, who was over the age of twenty-one years, entered upon the land in question hereinafter particularly described, and then and there discovered thereon a well defined vein or lode of valuable mineral bearing rock, and located the same as a lode mining claim 713.7 feet in length and 300 feet in width, and called and named the same the Hobson's Choice Lode mining claim.

17. That at the time of the said discovery the plaintiff posted at the point thereof a plain sign or notice containing the name of the lode, to-wit: the Hobson's Choice; the date of discovery, to-wit: the 23rd day of June, 1898; the name of the discoverer, to-wit: Charles Duncan Gurney; and thereafter and within sixty days from the date of said discovery the said plaintiff sunk or caused to be sunk at the point of such discovery a discovery shaft upon such lode or vein to a depth of more than ten feet below the lowest part of the rim thereof at the surface, and in such shaft and at such depth discovered and disclosed a well-defined vein or crevice of rock in place bearing gold, silver and other precious metals in appreciable quantities, and said plaintiff did then and there mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground one at each corner, and one at the center of each side line of said claim; and did then

and there mark said posts on the sides in toward the claim with the inscription denoting the respective corners of said claim.

18. That thereafter and within three months from the date of such discovery the plaintiff did file or cause to be filed with the clerk and recorder of the county of El Paso, in which said county said premises were on such date located, a certificate of location of such claim containing the name of the claim, to-wit; the Hobson's Choice, the name of the locator, to-wit: Charles Duncan Gurney; the date of location, to-wit: the 23rd day of June, 1898; the number

44 of feet in length claimed along the vein on each side of the center of said discovery shaft, to-wit: 633.7 feet northerly and 80 feet southerly, and the general course and direction of said vein or lode together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty; which said location certificate now appears of record in the office of the clerk and recorder of said county of El Paso and State of Colorado.

19. That the plaintiff has fully and completely complied with each and every of the laws of the State of Colorado, and of the United States governing the discovery and location of lode mining claims within the Cripple Creek mining district, aforesaid, with reference to the said Hobson's Choice Lode claim; provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain. And further it is admitted that during each and every calendar year since the said discovery and location of the Hobson's Choice claim not less than one hundred dollars' worth of work and labor and improvements have been done and made by plaintiff in respect of and to hold such claim.

20. That on the 15th day of July, A. D. 1898, the Commissioner of the General Land Office rendered a decision and made an order of which a certified copy is hereto attached, and marked "Exhibit K."

21. That on the 16th day of July, 1898, one J. A. Small was, and ever since has been, a citizen of the United States and over the
45 age of twenty-one years, and that on the said date, to-wit: the 16th day of July, 1898, the said J. A. Small entered upon the land in question hereinafter particularly described, and then and there discovered thereon a well defined vein or lode of valuable mineral bearing rock, and located the same as a mining claim 728 feet in length by 300 feet in width, and called and named the same the "P. and G." Lode mining claim.

22. That at the time of said discovery the said J. A. Small posted at the point thereof a plain sign or notice containing the name of the lode, to-wit: the "P. and G.;" the date of discovery, to-wit: July 16th, 1898; and the name of the discoverer, to-wit: J. A. Small; and thereafter, and within sixty days from the date of said discovery the said J. A. Small sank or caused to be sunk at the point of such discovery a discovery shaft upon such lode or vein to a depth of

more than ten feet below the lowest part of the rim thereof at the surface, and in such shaft and at such depth discovered and disclosed a well defined vein or crevice of rock in place bearing gold, silver and other precious metals in appreciable quantities; and said J. A. Small did then and there mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground, one at each corner and one at the center of each side line of said claim; and did then and there mark said posts on the sides in toward the claim with the inscription denoting the respective corners of said claim.

23. That thereafter and within three months from the date of such discovery the plaintiff did file or cause to be filed with the
46 clerk and recorder of the county of El Paso, in which said county said premises were on such date located, a certificate of location of said claim, containing the name of the claim, to-wit: the "P. and G.;" the name of the locator, to-wit: J. A. Small; the date of location, to-wit: July 16th 1898; the number of feet in length claimed along the vein on each side of the center of said discovery shaft, to-wit: 712 feet northerly and 16 feet southerly, and the general course and direction of said vein or lode; together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty; which said location certificate now appears of record in the office of the clerk and recorder of said county of El Paso, and State of Colorado.

24. That the said J. A. Small has fully and completely complied with each and every of the laws of the State of Colorado, and of the United States governing the discovery and location of lode mining claims within the Cripple Creek mining district aforesaid with reference to the said "P. and G." Lode claim; provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain. And further it is admitted that during each and every calendar year since the said discovery and location of the said "P. and G." Lode claim not less than one hundred dollars' worth of work and labor and improvements have been done and made by the said J. A. Small in respect of and to hold such claim.

47 25. That on the 27th day of April, 1898, the Commissioner of the General Land Office rendered a decision of which a copy is hereunto annexed and marked "Exhibit I."

26. That on the 19th day of June, 1899, the defendant made application to the United States land office, at Pueblo, Colorado, for a patent for said Scorpion Lode claim, as described in the plat and field notes on file in that office as survey No. 12641, and published his said application in a weekly newspaper published in the said county of Teller, and known as the Weekly Tribune, the first publication appearing in the issue of the said newspaper of the

4
25th day of June, 1899. That the plaintiff, on behalf of said Hob-

son's Choice Lode mining claim, during the period of such publication, and to-wit: on the 17th day of August, 1899, filed his protest and adverse claim against the entry by the defendant of the said Scorpion Lode claim for patent, and within thirty days from the filing of said adverse claim commenced the present proceedings in support of his said adverse claim; and that the said J. A. Small, on behalf of the said "P. and G." Lode mining claim, during the period of such publication, and to-wit: on the 6th day of July, 1899, filed his protest and adverse claim against the entry by the defendant of the said Scorpion Lode claim for patent, and within thirty days from the filing of said adverse claim commenced a suit in support of said adverse claim in the district court of the county of Teller, in which said suit the said J. A. Small was plaintiff, and the said F. C. Brown was defendant, which said suit was numbered 128 in the register of suits for said Teller county.

48 27. That on the 31st day of July, 1899, the Commissioner of the General Land Office rendered a decision, of which a copy is hereunto annexed, and marked "Exhibit J."

28. That all such proceedings in the United States land office as are recited in the exhibits hereunto annexed to have taken place are to be deemed as having taken place at the dates mentioned in said exhibits.

29. That the descriptions of the said Scorpion, Hobson's Choice and "P. and G." Lode claims, and the areas in conflict are the same given in the pleadings in this action, and the pleadings in the said action of J. A. Small *vs.* F. C. Brown are correct.

J. C. HELM AND
JONES & BUTLER,
Attorneys for Plaintiff.
T. F. MCCARTHY,
Attorney for Defendant.

49

EXHIBIT A.

N. DEPARTMENT OF THE INTERIOR, G. F. P.
L. M. W. GENERAL LAND OFFICE, J. E. W.
WASHINGTON, D. C., May 28, 1895.

Address only the Commissioner of the General Land Office.

Register and receiver, Pueblo, Colorado.

SIRS: In case of mineral entry No. 573, made March 6, 1895, by the Cripple Creek Gold Mining Company upon the Kohnyo and Fortuna lodes, the approved survey shows that the lode line of said Kohnyo claim intersects the Mt. Rosa placer claim survey No. 7407, and extends within its boundaries for the distance of about 350 feet.

Said placer claim is excluded from this entry, and, as shown by the records of this office, was patented April 24, 1893.

By said above intersection the Kohnyo lode is divided into two

non-contiguous tracts; the tract lying north of said placer claim extending about 500 feet in length along the lode line and containing the discovery shaft and improvements, while the tract on the southerly end of claim extends for a distance of about 700 feet.

Under departmental decision dated February 23, 1893, in case of the Silver Queen lode, a lode claim intersected by a prior placer location cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D., 186.

50 The right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

The claimant-company may, however, elect which of said tracts it desires to retain, the 500 feet on the north or the southerly 700 feet. If the latter tract is retained evidence of discovery of mineral thereon and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days in which to furnish required evidence or to appeal, in default of which the entry will be cancelled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice.

Should this decision become final, an amended survey will be required, establishing the southerly end line of the claim at the point where the lode intersects the placer claim.

Notify all known parties in interest hereof, in accordance with circular of October 28, 1886.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

a/24

U. S. LAND OFFICE, } ss:
Pueblo, Colo., }

I hereby certify that the foregoing has been compared with the original and found to be a true and correct copy.

J. R. GORDON, Register.

51 EXHIBIT B.

N. DEPARTMENT OF THE INTERIOR, W. O. C.
L. M. W. GENERAL LAND OFFICE, J. E. W.
WASHINGTON, D. C., September 16, 1895.

Address only the Commissioner of the General Land Office.

Register and receiver, Pueblo, Colorado.

SIRS: By letter N. of May 28, 1895, mineral entry No. 573 made March 6, 1895, by the Cripple Creek Gold Mining Company upon the Kohnyo and Fortuna lodes was held for cancellation as to that portion of said Kohnyo claim lying south of the patented Mt. Rosa placer claim, which divides the lode into two non-contiguous por-

tions, and is excluded from the published notice of application for patent and from entry for said lode.

I am now in receipt of your letter dated August 14, 1895, transmitting a petition of the Cripple Creek Gold Mining Company, through W. H. Leonard, agent, asking that it be allowed to make application for patent for the area in conflict between the Kohnyo lode and Mt. Rosa placer after inquiry has been made as to the existence of said vein according to the rules and regulations of the General Land Office, under the South Star decision, 20 L. D. 204.

It is set forth in said petition that said Kohnyo lode was located in October, 1891, and that said claim contains a vein or fissure of gold bearing rock with well defined walls extending throughout said claim from one end line to the other; that said vein has been opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim conflicting with said lode claim extending throughout said placer for a distance of about 350 feet; that application for patent for said placer claim was made August, 8, 1892, after the discovery and location of said Kohnyo lode; that said vein was at the time of the application for the placer "claimed and known to exist;" that it was then and is now a valid subsisting lode of great value; that by the terms of the patent granted for the Mt. Rosa placer said vein of quartz was expressly excepted and excluded from the ground; that the locators of said lode and their grantees have at all times since the location thereof, held, maintained, worked and possessed the said vein and said petitioner is now in possession thereof, and under the ruling of the South Star decision an application for patent can be made by petitioner in favor of the Kohnyo lode for said vein, and that patent may issue to the lode owner when it has been ascertained by inquiry instituted by the department that said lode was known to exist at date of placer application. The allegations contained in said petition are corroborated by the affidavits of several witnesses.

The record shows that the Kohnyo lode was located October 2, 1891, prior to the application for the Mt. Rosa placer, filed August 5, 1892, upon which entry was made and patent issued April 24, 1893.

In the South Star decision, to which reference is made, it was held that when it is ascertained by inquiry instituted by the department, or determined by a court of competent jurisdiction, that a lode claim exists within the boundaries of the land covered by a placer patent, and that such lode claim was known to exist at the date of the application for such patent, and was not applied for, the land embraced in said lode is reserved from the operation of the conveyance by the terms thereof and patent may issue for such lode if the law has been in other respects fully complied with.

The case under consideration is in its essential features analogous

to the case of the South Star lode, and the decision above quoted is therefore applicable.

Although the claimant for the Kohnyo lode excluded the ground in conflict with the patented Mt. Rosa placer claim, said lode if known to exist at the date of the placer application, under the terms of exception of the placer patent did not pass to the placer patentee, but the title to the same remains in the United States in trust for the lode claimant, if said claimant, as is alleged, remained in possession of said lode.

The question now to be determined is whether the lode was known to exist within the boundaries of the patented placer claim at the date of filing the placer application.

In view of the above you are hereby directed to notify claimants for the Kohnyo lode that they will be allowed thirty days in which to apply for an order for a hearing to be by them served in accordance with the rules of practice, at which to determine:

I. Whether the said Kohnyo location contains a valuable
54 lode or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

II. Whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim.

You will conduct the hearing in accordance with the rules of practice, and at the proper time transmit the record and evidence to this office, with your joint opinion thereon.

You will also advise the claimants for the entry that in the event of failure to apply for an order for a hearing within the period allowed of thirty days, my decision of May 28, 1895, will become final and the entry canceled in part.

Very respectfully,

S. W. LAMEREUX,
Commissioner.

a/7

U. S. LAND OFFICE, } ss:
Pueblo, Colorado,

I, J. R. Gordon, hereby certify that the foregoing has been compared with the original and found to be a true and correct copy.

J. R. GORDON, Register.

June 11, 1900.

55 EXHIBIT C.

C. C. H.	DEPARTMENT OF THE INTERIOR,	
N.	GENERAL LAND OFFICE,	J. V. W.
C. H. M.	WASHINGTON, D. C., January 8, 1896.	J. E. W.

In re Mineral Entry No. 573 upon the Kohnyo and Fortuna Lodes.
On Review.

Register and receiver, Pueblo, Colorado.

SIRS: It appears from the record in the above entitled matter that "the Cripple Creek Gold Mining Company," a corporation, filed in

your office its application for patent for the Kohnyo and Fortuna lodes on March 7, 1894.

Publication of notice was had, first insertion April 22, 1894 and last insertion June 24, 1894. No adverse claim being filed, you allowed applicant to make mineral entry for said two lodes on March 6, 1895.

Said Kohnyo lode was located October 2, 1891, certificate recorded December 29, 1891, and said location was surveyed October 31, 1893. Said Kohnyo lode is in conflict with the Mt. Rosa placer, and the conflict was excluded in the application for patent, the notice published, and the final certificate when issued. The exclusion

56 of said conflict had the effect to divide said Kohnyo lode into two separate non contiguous parts, on which account said mineral entry No. 573 was, by office letter dated May 28, 1895, held for cancellation as to one of the two parts, to-wit, all that part of the Kohnyo location lying south of said Mt. Rosa placer. It appears that said Mt. Rosa placer was located on September 19, 1891, notice recorded on September 29, 1891, and said location was surveyed on May 21, 1892. It further appears that application for patent No. 291, for said Mt. Rosa placer was filed August 5, 1892, mineral entry No. 259, including said Mt. Rosa placer was made on November 7, 1892, and that patent duly issued thereon including the conflict with the Kohnyo lode, dated April 24, 1893.

In said mineral application No. 291 the Kohnyo lode is not claimed, nor is any mention made of said lode.

By your letter of August 14, 1895, you transmitted the petition of entryman in said mineral entry No. 573, for a modification of said office decision of May 28, 1895, that said entryman be allowed a hearing at which to offer evidence for the purpose of showing that at date when said application for patent No. 291 for said Mt. Rosa placer was filed, said Kohnyo location was known to contain a valuable lode, and that in the event said entryman should satisfactorily establish the fact that said lode was valuable, and was known to be so valuable at date when application for said Mt. Rosa placer was filed, that in such case said entryman might be allowed to file a supplemental application and purchase

57 the ground in said conflict. In support of said petition it was alleged, in an affidavit made by the duly authorized agent of entryman "that said claim contains a vein or fissure of gold bearing rock with well defined walls extending throughout said claim from one end line to the other; that said vein has been opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim, survey No. 7407, conflicting with said lode claim, and extends throughout the said placer for a distance of about 350 feet; that said application for patent for the said placer claim was made August 8, 1892, in the U. S. land office at Pueblo, after the discovery and location of said Kohnyo vein or lode; that said vein was at the time of the application of the aforesaid placer claim claimed and

known to exist, and it was then, and is now a valid, subsisting lode of great value" * * * that the locators of said lode and their grantees have at all times since the location thereof, held, maintained, worked and possessed the said vein, and your petitioner is now in possession thereof." * * *

Said affidavit was in substance corroborated by three other several affidavits, two of which were made by original locators of the said Kohnyo lode. By office letter dated September 16, 1895, said decision of May 28, 1895, was modified, and you were directed to allow the petitioner a hearing. From said letter of September 16, 1895, I quote:

"Although the claimant for the Kohnyo lode excluded the ground in conflict with the patented Mt. Rosa placer claim, said lode, if known to exist at the date of the placer application, under the
58 terms of exception of the placer patent did not pass to the placer patentee, but the title to the same remains in the United States, in trust for the lode claimant, if said claimant, as is alleged, remained in possession of the lode. The question now to be determined is whether the lode was known to exist within the boundaries of the patented placer at the date of filing the placer application. In view of the above you are hereby directed to notify claimants for the Kohnyo lode they will be allowed thirty days in which to apply for an order for a hearing to be by them served in accordance with the rules of practice at which to determine:

"I. Whether the said Kohnyo location contains a valuable lode or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

"II. Whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim."

On December 9, 1895, resident counsel for John McConaghy, claiming to be the assignee of entryman and patentee for the said Mt. Rosa placer, filed a motion for review of said office decision of September 16, 1895, and a revocation of the order for a hearing in said decision contained.

In support of said motion the following specification of errors is on file.

I. Error in giving weight or consideration to the petition of the Kohnyo claimant for a hearing in view of the fact that the motion or petition was not served upon the placer claimant (claimant of record) or its assigns, and also in view of the fact that the
59 lode claimant by the exclusion of the ground in conflict with the placer claim, admitted that its lode did not extend into the conflicting ground.

II. Error in not taking cognizance of the fact that no cause of action is disclosed by the petition, it being nowhere alleged that said Kohnyo lode was at date of placer application known to exist within said placer conflict.

II. Counsel is in error as to the allegations in the petition, as in my judgment the petition alleged facts sufficient to make a *prima*

facie case. As conclusively disposing of the second exception of counsel I quote from the sworn petition.

* * * "That application for patent for the said placer claim was made August 8, 1892, in the U. S. land office at Pueblo after the discovery and location of said Kohnyo vein or lode; that said vein was at the time of the application of the aforesaid placer claim, claimed and known to exist, and it was then and is now a valid subsisting lode of great value." * * *

It is elsewhere alleged in said petition that said "claim contains a vein or fissure of gold bearing rock with well defined walls extending throughout said claim from one end line to the other; that said vein has been opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim, survey 7407, conflicting with said lode claim." * * *

The allegations in the petition are held to be sufficient, and the second exception is not well taken.

60 III. From the third exception, taken in connection with the latter part of the first, I understand the position of counsel to be that the exclusion of the ground in conflict in the application for patent filed by petitioner must be construed as an admission by petitioner that this lode does not enter nor pass through said excluded ground, and that because of such exclusion he is estopped from showing or alleging as a matter of fact that the lode does pass through said ground in conflict. The act of petitioner in excluding from its application the ground in conflict is not necessarily an admission on its part that the Kohnyo lode does not pass through the ground in conflict, and consequently the doctrine of estoppel does not apply. The fact that the exclusion was made was an intimation to the department that at the time petitioner was not asking for a U. S. patent to cover the excluded ground, but it constitutes no binding admission or intimation as to the character of the ground excluded. Moreover, it must be remembered:

1. That at the time when the petitioner filed application for the lode claim, the placer had been patented for almost a year.

2. As the law was then construed by the department the issuance of patent, however erroneously, terminated the jurisdiction of the department over the lands patented, 17 L. D. 280 and 10 L. D. 200.

3. Petitioner therefore would have been unable to get an application of record had it not excluded the ground included in the patented placer so long as the placer patent remained outstanding.

61 Desiring, as it did, to make entry under the then practice, it was compelled to exclude the patented ground, whatever its character might be, and in my judgment this is the fair and logical explanation of the conduct of petitioner in the premises.

I cannot therefore agree with counsel that petitioner is estopped from alleging and showing such facts as will have the effect to dem-

onstrate that the placer patent is, and always was, invalid to the extent of the Kohnyo Lode claim.

IV. In the fourth exception counsel erroneously intimates that this office has decided that the petitioner is in possession of the excluded patented ground. This office has not attempted, to decide that point. The question of possession is a question of fact, and one that must be established by proof, and unless the petitioner can show possession, and the right of possession, he cannot obtain a patent covering the ground. But up to the present time this office has not decided this point nor attempted to do so. But counsel further insists that the act of excluding from the application the conflict with said patented placer is tantamount to an abandonment of the excluded ground, citing Adams decision, 16 L. D., 233.

The doctrine announced in the decision cited must be construed to apply to cases like the one then under consideration. In that case entry No. 201 had been made for the Sunday *et al.* lodes, excluding the conflict of 1.482 acres in conflict between the Sunday lode and the Adams lode.

Subsequently entry No. 413 for the Adams *et al.* lodes was made including the ground in conflict between said Adams lode and the Sunday lode.

62 III. Error in not giving due weight in this case to the doctrine of estoppel not only of record but *in pais*.

IV. Error in holding that the *possession* of said conflict has remained in the lode claimants, when, under the rulings of the Secretary in the Adams Lode case, 16 L. D., 233, the lode claimant has *expressly* waived and relinquished all right, title, claim and interest in and to said conflict.

I. In my judgment there is no rule of practice applicable to the case at bar, which requires that notice of the petition should have been served upon the placer patentee, or his assignees. This class of contests is novel in departmental practice, originating as it does as the result of the doctrine announced in the South Star decision, 20 L. D., 204.

As the law was construed by the department prior to the said South Star decision, the only relief for a lode claimant in a case like the one under consideration, was to cause a suit to be instituted to vacate the placer patent to the extent of the lode, and therefore the department was frequently petitioned to recommend to the Department of Justice that a suit to vacate the placer patent be instituted. In those cases it was not the practice to serve the entryman of record with notice of the petition, but at the hearing or inquest which it was the practice to order with a view to determining whether or not it was expedient to grant the prayer of the petition and recommend the suit, the patentee was always notified and allowed to submit evidence and argument if he chose to do so.

63 As this office construed the South Star decision, a lode claimant has the option of showing in another way a state of

facts which by the terms of the placer patent, renders the same invalid to the extent of any lode contained within the exterior lines of said placer, and reasoning from analogy the practice should be the same. It is therefore held that service of notice of the petition upon the patentee was not required but that the ends of justice will be fully met if legal service of notice of the *hearing* is had upon the present owner of record. But counsel in the first exception further insists that the exclusion of said conflict is an admission that the lode did not extend into the conflicting ground. This proposition will be considered in connection with the third exception.

By office letter of February 27, 1892, it was decided that entryman for the Adams lode could not have patent for the ground in conflict, and said entry No. 413 was held for cancellation to that extent, and entryman for the Sunday lode was required to amend his application to purchase by striking out the clause which excluded the conflict, and to pay ten dollars additional as purchase money and make entry to include the ground in conflict.

The departmental decision cited by counsel reversed said decision, and in effect held that the Sunday application need not purchase or take patent for the ground in conflict if he did not wish to do so, and that inasmuch as said conflict had been excluded by the applicant for the Sunday lode, it was subject to the application for patent

for the Adams lode. An entirely different state of facts obtains in the case at bar, and hence the language used in said departmental decision is not applicable.

If the allegations of the petition herein are true, as stated in my letter of September 16, 1895, the placer patent did not operate to convey to the placer patentee the title to the Kohnyo lode, but the same is still vested in the United States in trust for the lode claimants, if they can show compliance with law.

In any event, the title to the Kohnyo lode did not pass with the placer patent, if said lode was known at date of the placer application, so that in my judgment the owner of the placer is in no position to object to the order for a hearing.

The motion for review is hereby denied, and the order for a hearing will stand as the decision of this office.

Notify the parties in interest.

Very respectfully,

S. W. LAMEREUX,
Commissioner.

(B-4)

(Here follows diagram marked page 65.)

Diagram showing conflict

Scale, 200 feet to an inch



66

EXHIBIT D.

C. C. H. DEPARTMENT OF THE INTERIOR, J. V. W.
 N. GENERAL LAND OFFICE, J. E. W.
 L. M. W. WASHINGTON, D. C., February 5, 1896.

Address only the Commissioner of the General Land Office.

In re Mineral Entry No. 573, Pueblo, Colorado. The Cripple Creek Gold Mining Company. Kohnyo and Fortuna Lodes.

Register and receiver, Pueblo, Colorado.

SIRS: In the above entitled matter the record of survey shows that the Kohnyo lode is crossed by the patented Mt. Rosa placer claim which divides the lode into two non-contiguous portions.

Said conflict was excluded in claimant's application for patent, as published and in the final certificate of entry.

By office letter N. of May 8, 1895, the entry was held for cancellation as to that portion of the Kohnyo claim lying south of the patented Mt. Rosa placer.

With your letter of August 14, 1895, you transmitted to this office a petition of the Cripple Creek Gold Mining Company, asking that a hearing be allowed for the purpose of showing that at the date of filing application for patent for the Mt. Rosa placer claim the Kohnyo location was known to contain a valuable lode, and
 67 that in the event that said fact should be established by claimant at said hearing, a supplemental application and purchase of the ground involved might be allowed to be made.

In support of said petition several affidavits were filed alleging the existence of a well defined vein or fissure of gold bearing rock extending throughout said claim from one end to the other, passing through the conflicting Mt. Rosa placer, where it was known to exist at the date of said placer application; also stating that said lode has been from the date of its location in the continuous possession of claimant, and has been worked and developed by claimant up to present date.

By letter N. of September 16, 1895, claimant's petition for a hearing was allowed, said decision holding that the case under consideration is in its essential features analogous to the case of the South Star lode, and further:

"Although the claimant for the Kohnyo lode excluded the ground in conflict with the patented Mt. Rosa placer claim, said lode if known to exist at the date of the placer application," under the terms of exception of the placer patent did not pass to "the placer patentee, but the title to the same remains in the United States in trust for the lode claimant, if said claimant," as is alleged, remained in possession of said lode.

"The question now to be determined is whether the lode was

"known to exist within the boundaries of the patented placer claim
"at the date of filing the placer application. In view of the above
"you are hereby directed to notify claimants for the Kohnyo
68 lode that they will be allowed thirty days within which to
apply for an order for a hearing to be by them" served in
accordance with the rules of practice, at which to determine,

I. Whether the said Kohnyo location contains a valuable "lode
"or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

"II. Whether such lode was known to exist at date of filing application for the Mt. Rosa placer claim."

On December 8, 1895, resident counsel for John McConaghy, assignee of patentee for the Mt. Rosa placer, filed a motion for review of said office decision of September 16, 1895, and a revocation of the order for a hearing.

By letter N. dated January 8, 1896, said motion for review was denied and the order for a hearing affirmed as the decision of this office.

I am now in receipt of a letter dated January 22, 1896, from resident counsel for John McConaghy assignee of the Mt. Rosa Mining Milling and Land Company, forwarding an appeal from my said decision dated September 16, 1895, and January 8, 1896, and containing specifications of error as follows:

I. Error in holding by implication that the Kohnyo claimant was entitled to show possessory title to the conflict between its claim on the Kohnyo lode and the patented Mt. Rosa placer, when by its own acts it expressly waived any possessory right or title to the ground by excluding the same from its publication and entry as well as from its application for patent.

69 II. Error in not holding that the express waiver by the Kohnyo claimant of the ground in conflict, operated as a bar to the setting up of possessory title, and by reason of the fact that the same had passed from the jurisdiction of the United States by letters patent, constituted in so far as the lode claimant is concerned, estoppel by the record.

III. Error in not holding that the expressed disavowal of the Kohnyo claimant of all intention to claim any portion of the conflict between the lode and the placer claim, and in making final entry of the lode excluding the said conflict with the said placer claim, created an estoppel *in pais* which forever barred this claimant for the lode from ever acquiring title to the conflicting placer ground (100 U. S., 578).

IV. Error in not holding that the record itself bars the Kohnyo claimant, and in itself furnishes a sufficient defense for the placer owner in law as well as in equity.

V. Error, in view of the foregoing, in not denying the petition for a hearing, no cause of action being disclosed.

Under rule 81 of practice an appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the

public lands and to private land claims, except in case of interlocutory orders and decisions and orders for hearing or other matter resting in the discretion of the Commissioner.

In the case under consideration the order directing a hearing is not such a final determination of the rights of the parties as would entitle the protestants to the right of appeal.

The appeal of protestants from my decision of September 70 16, 1895, and January 8, 1896, will not therefore be entertained, and you will so advise parties in interest, and that the case will remain suspended under rule 85 of practice.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

a/3

U. S. LAND OFFICE,
Pueblo, Colorado, } ss:

I, J. R. Gordon, hereby certify that the foregoing has been compared with the original and found to be a true and correct copy.

J. R. GORDON, Register.

18.

71

EXHIBIT E.

Copy.

1542.

F. L. C.

DEPARTMENT OF THE INTERIOR, G. B. G.
WASHINGTON, April 7, 1896. E. M. R.

In re KOHNYO LODE }
v. }
MT. ROSA PLACER CLAIM. }

The Commissioner of the General Land Office.

SIR: This is an application made by John McConaghy, assignee of the Mt. Rosa Mining Milling and Land Co., for a writ of certiorari, directing your office to transmit to the department the record in the above entitled case for consideration upon its appeal from the decision of your office of Sept. 16, 1895, directing the local officers at Pueblo, Colorado, to notify the claimants for the Kohnyo lode that they will be allowed thirty days in which to apply for an order for a hearing to determine whether the Kohnyo location contains a valuable lode or vein of mineral quartz within the Mt. Rosa placer limits, and whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim.

McConaghy's appeal was filed January 22, 1896, February 5, 1896, your office decided that McConaghy had no right of appeal and

72 suspended action on the case under rule 85 of practice.
Under rule 81 of practice no appeal will lie from the decision
of your office. The application is therefore denied.

The papers transmitted with your office letter "N" of March 7,
1896, are herewith returned.

Very respectfully,

JNO. M. REYNOLDS,
Act'g Secretary.

U. S. LAND OFFICE, }
Pueblo, Colo., } ss:

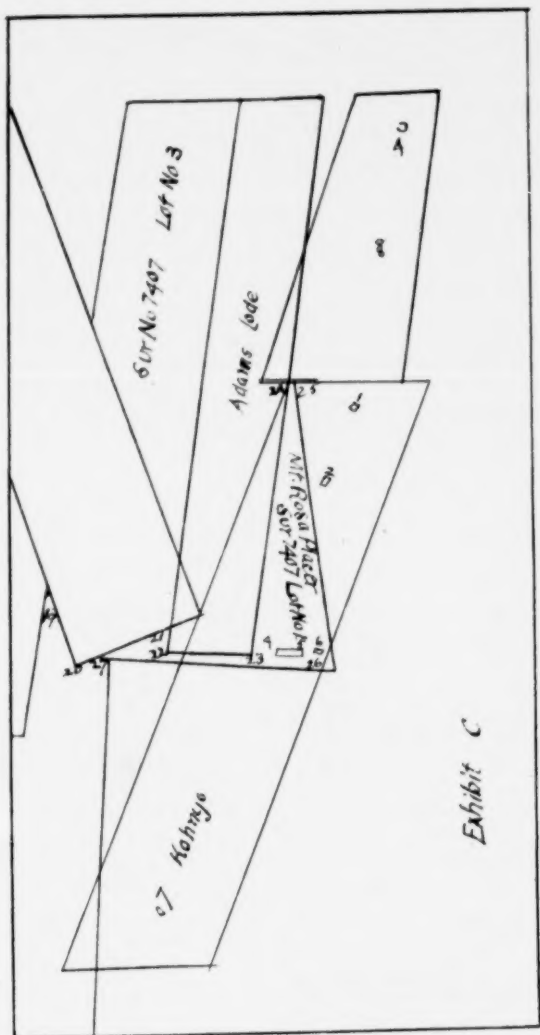
I, J. R. Gordon, do hereby certify that the foregoing has been
compared with the original on file in this office, and found to be a
true and correct copy thereof.

J. R. GORDON, Register.

Pueblo, Colo. June 5, 1900.

(Here follows diagram marked page 73.)

No. 97. }
 Brown } p. 73
 Turner }



Ex. "C"

Exhibit C



74

EXHIBIT "F."

Contest 1314.
1897-58484.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 22, 1897.

Register and receiver, Pueblo, Colorado.

SIRS: The evidence submitted at the hearing in the case of the Cripple Creek Gold Mining Company v. The Mt. Rosa Mining, Milling and Land Company and John McConaghy, assignee,—contest No. 1314, which involves ground in conflict between the patented Mt. Rosa placer claim, survey No. 7407, and the Kohnyo Lode claim, survey No. 8612, was received at this office June 22, 1897, and the entire record has been carefully examined.

The Mt. Rosa placer claim was located *September 19, 1891*, and the survey thereof was approved July 26, 1892.

August 5, 1892, the Mt. Rosa Mining Milling and Land Company filed an application for patent, which included the Mt. Rosa placer claim and the Adams, Jefferson, Mt. Rosa, Gold Coin and Rosa Lee Lode claims. Notice of said application was published from August 19, 1892, to and including October 21, following.

November 7, 1892, mineral entry No. 259 was allowed embracing the mining claims described in said application for patent.

The evidence submitted in support of said entry having been examined and found satisfactory, and no adverse nor protest having been filed against said application or entry, patent No. 22774 was issued thereon *April 24, 1893*.

75 In said application, entry and patent there was no express exclusion of the ground in conflict with the Kohnyo Lode claim, but said patent contains the usual recitals excluding known lodes.

The Kohnyo lode was located *October 2, 1891*, and the survey thereof was approved February 26, 1894.

March 7, 1894. The Cripple Creek Gold Mining Company, the contestant herein, claiming the Kohnyo and Fortuna Lode claims, filed its application for patent.

March 6, 1895, no adverse claim nor protest having been filed against the application for the lode claims last mentioned, and the evidence submitted in support thereof being deemed satisfactory, you therefore allowed mineral entry No. 573.

In the published notice of the application for patent for the Kohnyo claim, the application to purchase, the register's final certificate, and the receiver's receipt, the ground in conflict with the Mt. Rosa placer was expressly excluded.

May 28, 1895, the evidence submitted in support of said entry No. 573 was examined and thereupon a decision was rendered from which I quote:

By said above intersections the Kohnyo lode is divided into two

non-contiguous tracts; the tract lying north of said placer claim extending about 500 feet in length along the lode line and containing the discovery shaft and improvements, while the tract on the southerly end of the claim extends for a distance of about 700 feet.

Under departmental decision dated February 23, 1893, in case of the Silver Queen lode, a lode claim intersected by a prior
76 placer location cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D. 186.

The right of the Kohnyo lode, therefore, terminates where it intersects and passes through the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

The claimant company may, however, elect which of said tracts it desires to retain, the 500 feet on the north or the southerly 700 feet. If the latter tract is retained evidence of discovery of mineral thereon and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days in which to furnish required evidence or to appeal, in default of which the entry will be canceled to the extent of that portion of the claim lying south of the patented Mt. Rosa claim, without further notice.

No appeal was taken from said decision, but, with your letter of August 14, following, you transmitted contestant's corroborated petition, which in effect is as follows: That the Kohnyo Lode claim contains a vein or fissure of gold bearing rock with well defined walls, extending throughout from one end line to the other; that said vein has been opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim conflicting with said lode claim and extends throughout the placer for a distance of about 350 feet; that said vein was, at the time of filing the application for said placer claim, claimed and known to exist; that the locators of said lode claim and
77 their grantees have at all times since the location held, worked and possessed said vein; that according to the decision in the case of the South Star Lode claim, 20 L. D. 204, an application for patent may be made for the vein and surface ground in conflict between the Kohnyo survey and the patented Mt. Rosa placer claim, and that application is, therefore, made that petitioner be allowed to make supplemental application for patent embracing the area in conflict between the Kohnyo Lode claim and said placer after inquiry has been made as to the existence of said vein, according to the rules and regulations of this office.

Said petition was considered, and by office letter of September 16, 1895, a hearing was allowed to determine:

1. Whether the Kohnyo location contains a valuable lode or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

2. Whether such lode was known to exist at date of filing application for the Mt. Rosa placer claim.

December 9, 1895, the attorney for John McConaghy, assignee, of the Mt. Rosa Mining, Milling and Land Company, filed in this office

a motion for review and revocation of the decision of September 16th, 1895.

Said motion was considered and by office letter dated January 8, 1896, it was denied.

January 23rd, 1896, the defendants filed an appeal from the decision of September 16, 1895, and January 8, 1896, and this office, by its decision of February 5, 1896, held that the defendants had no right of appeal, and the same was not therefore entertained.

78 February 25, 1896, the attorney for defendants filed an application for writ of certiorari, which was denied by the departmental decision dated April 7, 1896, in which it was held, that under rule 81 of practice, no appeal would lie from the decisions complained of.

October 26, 1896, both parties, with counsel and witnesses appeared at your office, and the hearing was regularly held in accordance with the order contained in office letter of September 16, 1895.

May 1, 1897, you rendered your joint decision upon the evidence submitted. That portion of your decision which follows your statement of the case, is as follows:

The issue upon which testimony was submitted is:

1. Whether the said Kohno location contained a valuable lode or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

2d. Whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim.

A review of the testimony shows conclusively that the contestants have failed to establish the affirmative of either proposition. The three locators, McRay Brothers and Leonard, the superintendent of the work on the claim, the only witnesses for the protestants who had knowledge of the ground in conflict prior to the date of application for the Mt. Rosa placer, August 5, 1892, do not testify that a known lode existed at that time on said ground, but that they believed the veins opened at 1 and 2, "Exhibit C," intersects

79 the placer ground. No testimony whatever was offered to show that any vein was known to exist when application was made for placer patent.

On behalf of the claimants the testimony of witness- Wilson, Hills and Spicer was that they had made careful examination of the ground in conflict for the purpose of ascertaining if any veins or lodes existed at the date of application, and none could be found.

The register and receiver are of the opinion the protest should be dismissed.

June 1, 1897, the contestant filed an appeal from your decision, with specification of errors alleged therein. The specification of errors is as follows:

First. A review of the testimony does not show conclusively that the protestants have failed to establish the affirmative of either proposition.

Second. That the finding by the register and receiver that "the

three locators McRay Brothers and Leonard, the superintendent of work on the claim, the only witnesses for the protestants who had knowledge of the ground in conflict prior to the date of application of the Mt. Rosa placer, August 5, 1892, do not testify that a known lode existed at that time, but that they believed that the vein opened at 1 and 2, Exhibit C, intersected the placer ground," is erroneous and contrary to such evidence.

Fourth. That the finding by the register and receiver that "the testimony of Wilson, Hills and Spicer was that they had made careful examination of the ground in conflict for the purpose of ascertaining if any veins or lodes existed at date of application, and none could be found," is erroneous and contrary to the evidence.

Third. That the finding by the register and receiver that "no testimony whatever was offered to show any vein was known to exist when application was made for the placer patent," is erroneous and contrary to the evidence.

Fifth. That the dismissal of the application or protest of The Cripple Creek Gold Mining Company v. The Mt. Rosa M. M. & L. Company is manifest and material error and contrary to the evidence and law.

Contestant's argument contains a motion to vacate your decision, and in support thereof it is stated that Rope, Key & Co., bankers and brokers, made advertisement in the *Mining Investor* of July 10, 1897, a mining journal published at Colorado Springs, Colorado, as follows: Investors desiring large profits with a minimum of risk should purchase mining stocks on this market at their present low prices.

We believe that A. J., Isabella, Gold Standard, Mt. Rosa, Gould, Bluebell, Jack Pot and Garfield Grouse are good stocks to buy.

It is claimed that Mr. Key, member of said firm of bankers and brokers, and Mr. Key, the receiver, are one and the same person, and that this fact, taken in connection with an order dated March 3rd, 1896, in which the receiver, contrary to orders from this office, notified contestants that this case was dismissed, for want of prosecution shows that the receiver ought not to have participated

81 in the trial of this case.

I have carefully considered the evidence bearing upon the question raised by this motion, and have reached the conclusion that it has not been shown that the receiver had any property interest in the premises involved herein, or any interest of any kind which would disqualify him to act officially in the decision of this case. See *Emblen v. Weed*, 17 L. D., 220.

The attorney for contestees in his argument filed August 7, 1897, submits a motion as follows:

In view of the fact that Messrs. Smith, Leonard and Keith, witnesses for contestant, admit that their knowledge of the land was acquired subsequent to the filing of the Mt. Rosa placer application, and that it was shown at the hearing and by the official survey of

the Kohnyo lode that shafts Nos. 2, 4, 5, 6 and 7, and cut No. 3 (Exhibit C) were made long after the filing of said placer application, we now move that the testimony of said Smith, Leonard and Keith as a whole, be stricken from the record, and that any and all testimony relative to discoveries and developments in said shafts and cut mentioned above, be ruled out of consideration and declared inadmissible because immaterial, irrelevant and incompetent to prove any issue to be tried, and we respectfully ask a definite ruling upon this motion.

The issue between these parties must be determined upon due consideration of the *competent evidence* submitted in the case, and the testimony of the witnesses named in the last mentioned motion, as well as that of the other witnesses will be examined in order to ascertain the weight to be given thereto, under the recognized rules of evidence.

Contestee's motion is therefore denied.

For the purpose of convenient reference, Exhibit "A," which was delineated from the approved plat of the survey of the Kohnyo Lode claim, and a copy of contestant's Exhibit "C," which was regularly introduced in evidence at the trial of the case, are attached hereto.

Upon the trial of this case seven witnesses testified on behalf of the contestants, and six testified on behalf of contestees.

The evidence clearly and satisfactorily shows that a valuable gold bearing vein, between well defined walls, was discovered in the discovery shaft of the Kohnyo claim and in the other shaft shown on Exhibit "A," prior to August 5, 1892. At that time the discovery shaft was about eleven feet deep, and the other about thirty-five or forty. Said discoveries, considered independent of any other facts, would not sustain the allegation that a valuable mineral bearing vein or lode was known to exist within the limits of the ground in conflict between the Kohnyo Lode claim and Mt. Rosa placer, at the time of filing said application for patent. In support of this proposition the following, which occurs in the decision of Dahl v. Raunheim (132 U. S. 263) is quoted.

The discovery by the defendant of the Dahl lode, two or three hundred feet outside of those boundaries, does not, as observed by the court below create any presumption of the possession of the vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them.

The contestant in this case, however, does not rely solely upon the discoveries made in the discovery shaft, and the other shaft shown on Exhibit "A" to sustain its material allegations, but its contention is that the course of the veins disclosed in those shafts, the disclosures made in shaft No. 2 and the other excavations shown on Exhibit "C" by the figures 3, 4, 5, 6 and 7, made subsequent to the placer application, and the outcroppings visible at all times, show that a well defined vein was known to exist within the ground in conflict when said placer application was filed.

The testimony relative to the course of the veins disclosed in the

shafts shown on Exhibit "A" is so conflicting as to be of little value in determining the issues involved in this case.

The evidence shows, that subsequent to the filing of the placer application, several small excavations were made within the limits of the ground in controversy, and that mineral bearing veins were exposed therein, but these disclosures standing alone would not sustain the contestant's case.

Upon a careful consideration of the entire record, I am satisfied that the decision in this case depends upon the conclusions to be drawn from the testimony relative to the outcroppings and float within the limits of the ground in controversy, taken in connection with the disclosures made in the shafts shown on Exhibit "A," within the Kohnyo claim, and upon this point I deem the following to be a fair synopsis of the testimony.

84 C. E. McRay for the contestant testified, in effect, that he was one of the locators of the Kohnyo claim; that the discovery hole was sunk on a vein about two and a half feet wide, between well defined walls; that the vein outcropped north of location stake, also south; that he found outcroppings nearly the entire length of the claim; that the outcroppings consist of quartz rock more or less stained with mineral, and that in 1892, he found the outcroppings of three veins in the Kohnyo claim, one of which run a little east of south, and the other in a southerly direction.

C. F. McRay, for contestant, testified that he was one of the locators of the Kohnyo claim; that there was float all along on the slope of the hill south of the discovery or down as far as across the gulch; that he was satisfied from the float on the side of the hill that there was a vein there; that the ground in controversy is in the gulch and on the other side; that his brother did some work in 1882 on the southern part of the Kohnyo; that his brother called his attention to a small hole that showed mineral, just prospected, and that this hole appeared to be in rock in place, a kind of blow-out with streaks of mineral through it which he thought indicated a vein.

J. E. McRay, for contestants, testified that he was one of the locators of the Kohnyo, and there are two veins outcropping on said claim.

J. F. Smith, who, subsequent to the application for patent to the placer claim, surveyed the Kohnyo claim, testified for the
85 contestant that, referring to Exhibit "C," there is a red mark across the trench near 4 that represents the outcrop of a vein; that last Friday he followed through from 7 to the north of the gulch where shaft No. 2 is, and nearly all the way, except in the bottom of the gulch where the wash is deep, there was an indication of an outcrop, which in some places seemed to be in place, particularly between 4 and the south end of the claim; that a little west of there is an outcrop that seemed to run nearly north and south.

W. H. Leonard, for contestant, testified that he performed some work on the Kohnyo claim in 1894; that there is a vein that shows

from dump of shaft 1, Exhibit "C," which can be traced by walking along the line of the claim, except where it runs through the gulch, where it is covered with debris; that the surface of that claim is of such character that said rock can be run from place to place, in places it has the appearance of being solid, and in other places the wash would be a few feet deep, in the gulch probably more; that these outcroppings occur in rock in place, especially on that part of the hill where the discovery is.

C. A. Keith, for contestant, testified that he examined the Kohnyo claim in 1893; that he saw outcroppings in a good many places; that in crossing the gulch the vein disappears to some extent, but can be followed on each side, you cannot see it in all places except by a little excavation; that the character of the outcroppings is granite, a ridge of granite quartz the same as many other croppings in that granite country, and the ore is of the nature of granite quartz; that the vein cropping as he traced it is northeast and southwest, or south probably sixteen to twenty degrees; that the vein is disclosed in the discovery shaft and can be traced in about that course out of the south end line in the form of an outcrop.

On this question of outcroppings the following witnesses testified on behalf of the contestees in effect as follows:

G. S. Wilson testified that he was one of the locators of the Mt. Rosa placer; that to the best of his knowledge and belief there was no vein or lode known to exist within the ground in conflict at the time the placer application was filed; that there are no distinct vein croppings of the Kohnyo next to the placer, that there are boulders apparently granite, croppings here and there, but not in a continuous line, and they do not give the appearance of a true vein.

V. G. Hills, a mining engineer testified that he made the survey of the Mt. Rosa placer; that he made two careful examinations of the ground in controversy prior to August 5, 1892; that the ground in conflict is in a ravine between two ridges; that there is too much soil everywhere to disclose outcroppings except in the very summit of the two ridges; that just prior to August 5, 1892, he made an examination of the ground included in the placer to see whether or not there was any known lode; that there was no known lode known to exist at that time on that ground, that there was no evidence of any outcrop on the north end of the Kohnyo that can be traced, there are

evidences of vein formation on the surface but those evidences are not sufficiently definite for the purpose of showing whether they run in the same direction, aside from excavations, the veins cannot be traced; that he does not believe there are any solid croppings of rock in place on the ground in conflict, and that there is no certainty of outcroppings on the Kohnyo that indicate a vein.

J. C. Spicer testified that he had examined the ground in conflict prior to the application for the placer patent, and that no vein or lode was known to exist in the ground.

I hold that the rule of law, announced in *United States v. Iron Silver Mining Co.*, (128 U. S., 683-684) is applicable to the facts obtained from the testimony in this case. Said rule is contained in the following quotation :

It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascertained and be of such extent as to render the land more valuable on that account and justify their exploitation. Although pits and shafts had been sunk in various places, and what are termed mining cross cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand and gravel. Lodes and veins in quartz or other rock in place bearing gold, or silver or other metal were not disclosed when the application for the patent was made. The subsequent discovery of lodes upon the ground and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time.

Upon a careful consideration of the entire record in this case, including the able briefs and arguments of counsel, I have reached the conclusion, from the evidence, and accordingly so decide, that the contestant has failed to show, by a clear preponderance of the evidence *that at the time of the application for patent for the Mt. Rosa placer claim was filed*, it was known that the ground in controversy herein contained a valuable vein or lode bearing mineral. Your decision as to the facts is, accordingly, modified, and contestant's petition to be allowed, under departmental decision in case of the South Star Lode claim (20 L. D., 204), to enter and receive a patent for the ground in controversy is hereby denied.

Notify the parties in interest hereof, and at the proper time transmit evidence of service, together with all papers filed, and your report as required by circular approved October 28, 1886, (5 L. D., 204).

Very respectfully,
2.14.

BINGER HERMANN,
Commissioner.

89

EXHIBIT G.

U. S. L. O., Pueblo, Colo.

Received — o'clock — m., May 19, 1898, from — mail counter.

Vol. 26-62.
W. V. D.DEPARTMENT OF THE INTERIOR,
WASHINGTON, May 7, 1898.P. J. C.
F. L. C.

THE CRIPPLE CREEK GOLD MINING COMPANY }
v.
THE MT. ROSA MINING, MILLING AND LAND CO. }

The Commissioner of the General Land Office.

SIR: The Mt. Rosa placer, survey No. 7407, Pueblo, Colorado, land district was located September 19, 1891, application for patent thereto was made August 5, 1892, and patent was issued April 24, 1893. The placer application stated that certain veins or lodes were situate within the boundaries of the placer claim, some of which were included in, and others excluded from the application, but it contained no mention of the Kohnyo vein or lode.

March 7, 1894, the Cripple Creek Gold Mining Company made application for patent, for the Fortuna and Kohnyo Lode mining claims, survey No. 8612. The Kohnyo claim was located October 2, 1891, after the location of the placer claim and before the application for the placer patent, and is intersected about its center by one corner of the placer which extends across the lode claim from one side line to the other, thus dividing the lode claim into two non-contiguous tracts. The Kohnyo claimant did not adverse the placer application.

August 10, 1895, the Kohnyo claimant filed in your office in connection with the prosecution of its application for patent, a petition alleging that the Kohnyo vein or lode was at the time of the placer application, known to exist within the boundaries of the placer and was therefore excepted and excluded from the placer patent, and asking that in the event of its establishing this allegation, it be permitted to obtain patent to the ground in conflict under the ruling of the South Star lode (20 L. D., 204).

On consideration of this petition your office, by letter of September 16, 1895, held that if said vein or lode was known to exist when the placer application was made, August 5, 1892; the title thereto remained in the United States and could not be acquired under the laws relating to lode claims, and ordered a hearing to determine the truth of the lode claimant's allegations.

A hearing was had before the local officers, who held that no vein or lode was known to exist within the ground in conflict at the date of the placer application. On appeal, your office October 22, 1897, affirmed this decision. The case is now before the department on

91 further appeal by the lode claimant, who alleges error in this finding of the local office and of your office and in a ruling requiring the lode claimant to assume the burden of proving the known existence of the vein or lode at the time of the placer application.

In 1891 a shaft was sunk on the Kohnyo location about ten and one-half feet deep, in which a vein or lode of mineral was discovered and in 1892 a second shaft was sunk therein to a depth of twenty to twenty-five feet, prior to August 5, 1892, the date of the placer application. The work in this second shaft disclosed two or three small veins, but whether any of them was the vein disclosed in the first shaft was not known. Both shafts were outside of the placer boundaries and near the northerly end of the lode claim, being distant about two hundred feet from the intersection of the claimed vein with the placer boundary. These veins or lodes had not been shown at that time to possess mineral of sufficient quantity and quality to give them commercial value or to justify expenditure in their extraction. So far as disclosed the veins or lodes in the two shafts appeared to take the general direction of the lode claim and their continuous existence in that direction for the full length of the claim would have carried them through the conflicting portion of the placer, but their presence either within the placer boundaries or in the southerly end of the lode claim was not shown by any discovery or development before the application was made for the placer patent. During the years 1891 and 1892 some small holes were dug in the northerly and southerly ends of the lode claim, and outside of the placer boundaries, but they did not disclose

92 the presence of any vein or lode. This is all that was done in the way of discovery and tracing of the vein in question prior to the date of the placer application. Much testimony was produced at the hearing respecting the subsequent discovery and tracing of a vein or veins — and through the ground in conflict, but since the rights of the placer patentee are to be determined by the conditions prevailing at the date of the placer application evidence of subsequent discovery and development cannot throw any light upon these conditions and should not be considered. Such subsequent discovery and development could not act retrospectively and change or affect the knowledge possessed by the placer claimant or others at the time of the application for placer patent. Upon this question it was said in *United States v. Iron Silver Mining Co.*, (128 U. S., 673, 683):

Lodes and veins in quartz or other rock in place, bearing gold or silver or other metal, were not disclosed when the application for the placer patents was made. The subsequent discovery of lodes upon the ground and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time.

See, also *Sullivan v. Iron Silver Mining Co.* (143 U. S., 431, 434).

It is contended that the Kohnyo vein is shown to have outcropped throughout the length of the lode claim, including the conflict
 93 with the placer, to such an extent as to be visible to one making an examination of the surface, and that this charged the placer claimant with knowledge of its existence. The evidence on the part of the lode claimant upon this point is not convincing. While some of the witnesses say, in a general way, that the vein did so outcrop, the substance of their testimony is that "float" more or less stained with mineral, was found on the surface of the claim at different points, but that these indications could not be traced continuously through the claim or through the ground in conflict. One of these witnesses, an original locator of the Kohnyo, says: "We could not tell whether it was float from this vein or not."

The testimony on behalf of the placer patentee is to the effect that these so-called outcroppings consist of granite boulders not in a continuous line, and not having the appearance of a vein; that there is too much soil everywhere on the claim except on the summit of the ridges to see an outcrop, and that in the gulch or ravine it was more than eight feet through the wash to the solid formation.

That portion of section 2333 of the Revised Statutes which controls this case reads as follows:

" * * * And where a vein or lode * * * is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the
 94 boundaries thereof."

The application for the placer patent did not include an application for the Kohnyo vein or lode, and it necessarily follows from the language of the statute that if that vein or lode was known to exist within the placer boundaries at the time of the placer application, the failure of the placer claimant to include therein an application for such vein or lode must be construed as a conclusive declaration that it had no right or claim thereto. Upon the other hand, if the existence of the vein or lode in the placer claim was not known at that time, by the terms of the statute it was embraced in the placer patent, and conveyed to the patentee therein.

The questions therefore which arise upon the record and upon the lode claimant's appeal are:

First. Whether it is shown that this vein or lode was known to exist within the placer boundaries at the time of the placer application; and

Second. Whether the burden of proving such known existence was rightly placed upon the lode claimant.

It is contended that the location of the vein or lode October 2,

1891, based upon a discovery made outside of the placer boundaries and about two hundred feet to the north thereof, gave it the status of a known vein or lode within the meaning of the statute, even though the actual existence thereof had not been discovered either within or to the south of the placer claim. The existence of a

95 vein or lode is necessary to the making of a lode location.

The thing located is a mineral-bearing vein or lode, and the surface ground which can be taken "along the vein or lode" is an incident thereto, intended to facilitate the convenient and safe working of the mine. Where the existence of a vein or lode within a placer claim is otherwise unknown, its existence is not made known by the mere inclusion of that ground within a lode location. The marking of a lode claim upon the ground, and the recording of a location notice, may actually or constructively extend to others the knowledge upon which the lode claimants based their location, but it cannot make known a vein or lode the existence of which is otherwise altogether unknown. The fact that the surface area in conflict was claimed under the lode location prior to the placer application, is not in itself controlling, for if, in fact, the vein or lode was not known to exist within the placer boundaries at that time it was conveyed to the placer claimant by the placer patent. The statute so provides in clear and unambiguous terms. In *Iron Silver Mining Co. v. Reynolds*, (124 U. S., 374, 382) the court said: "The statute does not except veins or lodes" *claimed* or known to exist," but only such as are "known to exist," and it fixes the time at which such knowledge is to be had as that of the application for the patent.

The Supreme Court has had frequent occasion to consider and determine what constitutes a known vein or lode. In *United States v. Iron Silver Mining Co.*, (128 U. S., 673, 683) it was said:

96 "It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal to justify their designation as "known" veins or lodes. To meet that designation the veins or lodes must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

In *Dahl v. Raunheim* (132 U. S. 260, 263) referring to the claimed existence of a known vein or lode within a placer claim at the time of the application for placer patent, the court said: * * * there was no evidence of any lode existing within the boundaries of his claim, either when the plaintiff made his application or at any time before. The discovery of the defendant of the Dahl lode, two or three hundred feet outside of these boundaries does not, as observed by the court below, create any presumption of the possession of a vein or lode within these boundaries, nor, we may add, that a vein or lode existed within them.

In *Iron Silver Mining Co. v. Mike and Star Co.* (143 U. S., 394, 404) the court said:

It is undoubtedly true, that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute.

In *Sullivan v. Iron Silver Mining Co.* (143 U. S. 431, 435) the court held :

And after that, defendants offered a mass of testimony, the scope of which was similar to that condemned as insufficient in the case of *Iron Silver Mining Co. v. Reynolds*, *supra*. Its purport was that it was commonly believed that underlying all the country in that vicinity was a nearly horizontal vein or deposit, frequently called a blanket vein ; and that the parties who were instrumental in securing this placer patent shared in that belief, and obtained the patent with a view to thereafter developing such underlying vein. But whatever beliefs may have been entertained generally, or by the placer patentees alone, there was up to the time the patent was obtained no knowledge in respect thereto. It was so far as disclosed by this testimony on the part of everybody, patentees included, merely a matter of speculation and belief, based not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory. Such belief is not the knowledge required by the section. In the case referred to this court said : " There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge, and thus in effect incorporate new terms into the statute."

See, also, *Migeon et al. v. Montana Ry. Co.* (77 Fed. Rep., 249; U. S. App., 724).

The rulings of the Supreme Court upon the exception of mining claims from townsite patents are also worthy of consideration in this connection. In *Dower v. Richards* (151 U. S., 658, 663) it was said :

It is established by former decisions of this court that under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact contain minerals or even valuable minerals when the townsite patent takes effect ; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them ; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming

under the townsite patent. *Deffeback v. Hawke*, 115 U. S. 392; *Davis v. Webbald*, 139 U. S., 507.

Examined and considered in the light of these decisions the evidence in the case at bar, as hereinbefore summarized, does not show that any vein or lode was known to exist within the ground in conflict when the placer patent was applied for. This conclusion receives some support in the conduct of the lode claimant. If the lode location embraced a vein or lode, the existence of which within the placer boundaries was then ascertained and known, an adverse claim duly filed and prosecuted would have resulted in the direct and special exclusion from the placer patent of such known vein or lode, and the adjoining surface area rightfully incident thereto. While the exception of a known vein or lode not applied for by the placer claimant does not depend upon the filing and prosecution
99 of an adverse claim, the fact remains that this course presents the most effectual means of obtaining a final and satisfactory determination and adjustment of the rights of the conflicting claimants. The lode claimant, however, did not adverse the placer application, but permitted the issuance of a patent for the area in conflict as placer ground, April 24, 1893; March 7, 1894, it made application for patent for the lode claim excluding therefrom and from the published and posted notices thereof the area in conflict and mineral entry thereof likewise excluding the conflict, was made March 6, 1895. It was not until after your office had ruled that the non-contiguous tracts upon either side of the intersecting placer could not be entered as one lode claim and had required the lode claimant to elect which of the two tracts it would take, that any right was asserted under the lode claim to the area in conflict. Under these circumstances it was that the existence of a vein or lode within the placer boundaries was alleged to have been known when the placer application was made. While this subsequent conduct of the lode claimant could not alter or change the conditions existing at the time of the placer application, and by which the rights of the parties must be determined, it may properly be referred to and considered as tending to show the lode claimant's estimate and opinion of those conditions and its rights thereunder.

The placer claimant has a Government patent for the land in controversy, obtained from a showing held by the Land Department to establish the placer character thereof, and the lode claimant has
100 attacked that patent alleging that this land contained when the patent was applied for a known vein or lode and was therefore excepted from the operation of the patent. This allegation amounts to nothing if not sustained by proof. The placer patentee was certainly not called upon to support the title apparently conferred by the patent simply because it was assailed by some one who found an obstacle to the obtaining of title to the same ground. It was therefore incumbent upon the lode claimant to establish the truth of its allegations, and the burden of proving

them was rightly placed upon it. *Discovery Placer Claim v. Murry* (25 L. D., 460, 463).

For the reasons stated your office decision is affirmed.

Herewith are returned the papers.

Very respectfully,

C. N. BLISS, Secretary.

U. S. LAND OFFICE, }
Pueblo, Colorado, } ss :

I, J. R. Gordon, do hereby certify that the foregoing has been compared with the original on file in this office and found to be a true and correct copy.

J. R. GORDON, Register.

June 6, 1900.

101

EXHIBIT H.

STATE OF RHODE ISLAND, }
County of Providence, } ss :

Lyman B. Goff, of lawful age, being first duly sworn, deposes and says that he is the duly elected and acting president of the Cripple Creek Gold Mining Company, which company is the owner of the Kohnyo and Fortuna Lode mining claims, covered by Pueblo, Colorado, mineral entry No. 573, which was made March 6, 1895.

Affiant says that he has been fully advised as to the contents of a letter or decision of the Commissioner of the General Land Office of date May 28, 1895, and of the decision of the Secretary of the Interior of date May 7, 1898.

With authority so to do, affiant hereby waives the right of review of the last mentioned decision, and elects to retain in said M. E. No. 573, that portion of the Kohnyo Lode claim which is described in the above mentioned letter of the Commissioner as "the five hundred feet on the north."

Further affiant saith not.

(Signed)

LYMAN B. GOFF.

Subscribed and sworn to before me, this 10th day of June, A. D. 1898.

(Signed)

ANDREW M. HULL,

[SEAL.]

Notary Public.

Election by C. C. G. M. Co. to take north tract.

102

EXHIBIT I.

1899-31010.

" 43116.

N.
C. A. B.DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 27, 1899.

Register and receiver, Pueblo, Colorado.

Sirs: March 6, 1895, the Cripple Creek Gold Mining Company made mineral entry No. 573 for the Kohnyo and Fortuna Lode claims embraced in mineral entry No. 8612, but, in said entry, the conflict with the Mt. Rosa patented placer claim, mineral entry No. 7407, was expressly excluded.

By said conflict and exclusion the Kohnyo Lode claim was divided into two non-contiguous tracts; the tract lying north of said placer containing the discovery shaft and improvements. See attached diagram.

Upon the examination of said entry a decision was rendered May 28, 1895, from which I quote:

Under departmental decision dated February 23, 1893, in case of the Silver Queen lode, a lode claim intersected by a prior placer location, cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D., 186.

The right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

103 The claimant company may, however, elect which of said tracts it desires to retain, the five hundred feet on the north or the southerly 700 feet. If the latter tract is retained evidence of discovery of mineral thereon, and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days within which to furnish required evidence or to appeal, in default of which the entry will be canceled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice.

Should this decision become final an amended survey will be required, establishing the southerly end line of the claim at the point where the lode intersects the placer claim.

Upon the rendition of said decision the claimant of the Kohnyo Lode claim filed a petition to be allowed to amend its entry by including therein the ground in conflict with said placer claim, and upon said petition contest No. 1314, *The Cripple Creek Gold Mining Company v. The Mt. Rosa Mining and Milling and Land Company* ensued, which contest has been finally decided adversely to the Kohnyo claimant. See 26 L. D., 622.

From letter of July 15, 1898, relative to said entry No. 573, I quote:

In view of the fact that no motion for review of the departmental decision of May 7, 1898, affirming the decision rendered by this office May 28, 1895, was filed within the time prescribed by rules of practice, the decision last mentioned became final and it now devolves upon this office to execute the same.

104 In view of the foregoing said mineral entry is hereby canceled as to the Kohnyo claim except as to that portion of the ground lying easterly of line 25-26, survey No. 7407, for the Mt. Rosa patented placer claim.

The claimant of the Kohnyo Lode claim will be allowed sixty days from due notice hereof within which to take the proper steps to have the amended survey made in accordance with the decision of May 28, 1895, and in case of default, said entry will be canceled in its entirety.

The surveyor general of Colorado, with his letter of February 24, 1899, submitted the approved field notes and plat of an amended survey of the Kohnyo and Fortuna Lode claims. The boundaries of the Kohnyo claim and the lode line as shown upon the amended plat are indicated by blue lines upon the attached diagram.

A careful examination of the original survey of, and the application for patent for said lode claims discloses that the applicant applied for a lode vein beginning at the discovery shaft of the Kohnyo and running N. $20^{\circ} 40'$ E. 70 feet and S. $20^{\circ} 40'$ W., 1319.9 feet.

Upon the plat of the amended survey the line of the Kohnyo Lode vein is described as beginning at the same discovery shaft and running N. $7^{\circ} 20'$ E., 67.51 feet, and S. $7^{\circ} 20'$ W., 495.87 feet.

With your letter dated March 7, 1899, you transmitted the protest of John McConaghy, against the approval and acceptance
105 of the amended survey in this case.

The protest is corroborated, and therein the protestant alleges, in substance, that he is the owner of the Hypatia Lode claim which conflicts with the Kohnyo Lode claim as described in the amended survey thereof; that in the amended survey the southerly end line is established at a point far south of that at which the Kohnyo vein intersects line 25-26 of the Mt. Rosa placer claim, and that the deputy mineral surveyor has attempted to mislead this office into the idea that the Kohnyo lode intersects the southerly end line as shown in the amended survey.

The protestant further alleges that his rights on the Hypatia Lode claim would be interfered with and destroyed by establishing the southerly end line as established by the amended survey.

April 10, 1899, the attorneys for the entryman submitted a request or motion to have patent issued without further delay for the Fortuna Lode claim, leaving the entry intact as to the Kohnyo claim, and the question of issuance of patent therefor to be determined subsequently.

There is an apparent issue of fact between the entryman and this

protestant as to the true position and course of said vein. The entryman's contention, as indicated by the amended survey being that the true lode line does not intersect line 25-26 of the said placer claim at the point indicated by the original survey, but at a point considerably south thereof shown by the plat of the amended survey. With this contention the protestant takes issue and alleges that the Kohnyo vein does not take the direction indicated
 106 on the amended plat, and that the location is void beyond the point where the Kohnyo vein intersects the patented placer as claimed by the applicant at the time of the hearing heretofore had.

Carefully considering the protest in connection with the entire record in the case, a serious doubt arises as to the position and course of the Kohnyo vein. Therefore you will notify said protestant that he will be allowed thirty days within which to apply for an order for a hearing at which evidence may be submitted by both parties to determine the true position and course of the Kohnyo vein, and to determine further at what point said vein on its southerly strike intersects one of the boundary lines of the Kohnyo Lode claim, as described in the amended survey thereof.

The request of claimant that the Fortuna claim be passed to patent on the entry and the Kohnyo claim be held in abeyance to be patented hereafter upon the same entry cannot be granted. There has been no decision or ruling of this office against the patenting of the claims together in the regular and proper way as applied for and entered, and the desire of the claimant to expedite action on the Fortuna claim is not sufficient reason for departure from the regular practice and rule of the office.

If the claimant so elects the entry will be canceled as to the Kohnyo claim and allowed to proceed as to the Fortuna, proceedings *de novo* could then be commenced for the Kohnyo, this is the uniform course in such cases.

The protest above mentioned is herewith returned that it may be used at the hearing, in case one should be held.

107 Notify parties in interest hereof, and in due time make report as required by the regulations.

Very respectfully,

(Signed)

BINGER HERMANN,
 Commissioner.

M. E. McA. 24.

108

EXHIBIT J.

"N."

1899-89301-90335.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 31, 1899.

Register and receiver, Pueblo, Colorado.

SIRS: March 6, 1895, the Cripple Creek Gold Mining Company made mineral entry No. 573 for the Kohnyo and Fortuna Lode claims, embraced in mineral entry No. 8612.

By decision of this office rendered May 28, 1895, said entry was held for cancellation as to the southerly portion of the Kohnyo Lode claim.

From said decision I quote: "Should this decision become final an amended survey will be required, establishing the southerly end line of the claim at the point where the lode intersects the placer claim."

A contest ensued.

In a decision rendered by this office July 15, 1898, it was stated that "in view of the foregoing said mineral entry is hereby canceled as to the Kohnyo claim except as to that portion of the ground lying easterly of line 25-26, survey No. 7407, for the Mt. Rosa patented placer.

"The claimant of the Kohnyo Lode claim will be allowed sixty days from due notice hereof within which to take the proper
109 steps to have the amended survey made in accordance with the decision of May 28, 1895, and in case of default, said entry will be canceled in its entirety."

The surveyor general of Colorado, with his letter of February 24, 1899, submitted the approved field notes and plat of an amended survey of said lode claim.

A careful examination of the original survey of, and the application for patent, for said lode claims discloses that the applicant applied for a lode or vein beginning at the discovery shaft of the Kohnyo claim and running N. 20° 40' E., 70 feet, and S. 20° 40' W., 1319.9 feet.

Upon the plat of the amended survey the line of the Kohnyo lode or vein is described as beginning at the same discovery shaft, and running N. 7° 20' E., 67.51 feet, and S. 7° 20' W., 495.87 feet.

With your letter of March 7, 1899, you transmitted the protest of John McConaghy, against the approval and acceptance of the amended survey in this case.

The protestant alleged, in substance, that he is the owner of the Hypatia Lode claim which conflicts with the Kohnyo Lode claim

as described in the amended survey thereof; that in the amended survey the southerly end line is established at a point far south of that at which the Kohnyo vein intersects line 25-26 of the Mt. Rosa placer claim, and that the deputy mineral surveyor has attempted to mislead this office into the idea that the Kohnyo lode intersects the southerly end line as shown in the amended survey.

The protestant further alleged that his rights on the Hypatia Lode claim would be interfered with and destroyed by establishing the southerly end line as established by the amended survey.

By decision of this office, dated April 27, 1899, the request for the issuance of a patent for the Fortuna Lode claim, leaving the Kohnyo claim to be subsequently disposed of, was denied, and the said protestant was allowed thirty days within which to apply for an order for a hearing to determine the true position and course of the Kohnyo vein.

An appeal was taken from the decision of April 27, 1899, and thereupon the honorable Secretary rendered a decision June 3, 1899 (28 L. D., 451) which see.

By the terms of said departmental decision, the Cripple Creek Gold Mining Company was allowed to have a patent issued for the Fortuna Lode claim, and the patent has accordingly been issued. As to the Kohnyo claim, the decision last mentioned allowed said company to commence proceedings for the reinstatement of said entry, and directed that further action on the appeal be deferred until the question of the reinstatement of the Kohnyo entry as to the southern portion of the Kohnyo location has been determined.

July 18, 1899, Messrs. Thayer & Rankin, the attorneys of record for said company filed with the honorable Secretary a withdrawal of the appeal from the decision of this office dated April 27, 1899.

July 18, 1899, Messrs. Thayer and Rankin filed in this office a paper signed by them as attorneys for said company, and from said paper I quote: "In the matter of John McConaghy, protestant

111 *vs.* The Cripple Creek Gold Mining Company, Pueblo, Colorado, mineral entry No. 573, Kohnyo lode, we have the honor to enclose herewith a copy of our *withdrawal of appeal* from your decision "N" of April 27, 1899, which withdrawal we have this day filed with the honorable Secretary of the Interior. * * *

"Acting under instructions from the Cripple Creek Gold Mining Company, we hereby waive all claims to right of reinstatement of the said southern portion of the Kohnyo location.

"In March last one John McConaghy, representing himself as owner of the Hypatia Lode claim, filed a protest against the amended survey of the Kohnyo Lode claim, which was approved by the U. S. surveyor-general February 24, 1899, and in your decision of April 27, 1899, you allowed the protestant thirty days within which to apply for a hearing on said protest.

"We are directed by our clients to waive all claims under said amended survey and to concede the course of the vein as given in

the original location and official survey, and we hereby make such waiver and concession.

"The purpose and effect of this waiver and concession is to eliminate the controversy with said protestant.

"We have now the honor to apply for a further amended survey of the north end of the Kohnyo, for the purpose of establishing the southerly end line at the point where the vein intersects the line of the patented Mount Rosa placer, relying upon the course of the vein as given in original location on official survey."

112 In view of the foregoing, the amended survey of the Kohnyo and Fortuna Lode claim, is hereby rejected and vacated, and the order for a hearing contained in the decision of April 27, 1899, is now recalled, and McConaghy's said protest is dismissed, in view of the subsequent action taken.

You will notify the Cripple Creek Gold Mining Company that sixty days are allowed within which to file with the surveyor general application for an amended survey in accordance with the decision of May 28, 1895, or to appeal, and that in case of default said entry will be canceled as to the Kohnyo Lode claim.

113

EXHIBIT K.

N.

E. C. F.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., June 29, 1900.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy, pages 1 to 5 inclusive, of office decision of July 15, 1898, in case of the Kohnyo Lode claim, mineral entry No. 573, Pueblo, Colorado, land district, is a true and literal exemplification of the record of said decision on file in this office.

[SEAL.] In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

BINGER HERMANN,

Commissioner of the General Land Office.

114

N. DEPARTMENT OF THE INTERIOR, W. O. C. H. G. P.
C. A. B. GENERAL LAND OFFICE, J. V. W.

WASHINGTON, D. C., July 15, 1898.

Register and receiver, Pueblo, Colorado.

SIRS: The Kohnyo Lode claim, survey No. 8612, conflicts with the patented Mt. Rosa placer claim, survey No. 7407, as shown by the attached diagram delineated from the approved surveys.

March 6, 1895, the Cripple Creek Gold Mining Company made mineral entry No. 573 for the Kohnyo Lode claim exclusive of the conflict with said patented placer claim.

By said conflict and exclusion the Kohnyo Lode claim was divided into two non-contiguous tracts; the tract lying north of said placer containing the discovery shaft and improvements.

Upon the examination of said entry a decision was rendered May 28, 1895, from which I quote:

Under departmental decision dated February 23, 1893, in case of the Silver Queen lode, a lode claim intersected by a prior placer location, cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D., 186.

The right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

115 The complainant-company may, however, elect which of said tracts it desires to retain, the five hundred feet on the north or the southerly 700 feet. If the latter tract is retained, evidence of discovery of mineral thereon, and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days in which to furnish required evidence or to appeal, in default of which the entry will be canceled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice from this office.

Upon the rendition of said decision the claimant of the Kohnyo Lode claim filed a petition to be allowed to include in its entry the ground in conflict with said placer claim, and upon said petition contest No. 1314, The Cripple Creek Gold Mining Company v. The Mt. Rosa Mining and Milling and Land Company ensued, which has been finally decided adversely to the Kohnyo claimant, and was closed by my letter of June 27, 1898.

June 14, 1898, the claimant of the Kohnyo claim filed in this office an instrument executed by the president of the Cripple Creek Gold Mining Company, in which he waived the right of review of the departmental decision in the contest referred to, and elected to retain in said entry that portion of the Kohnyo claim described as the five hundred feet on the north.

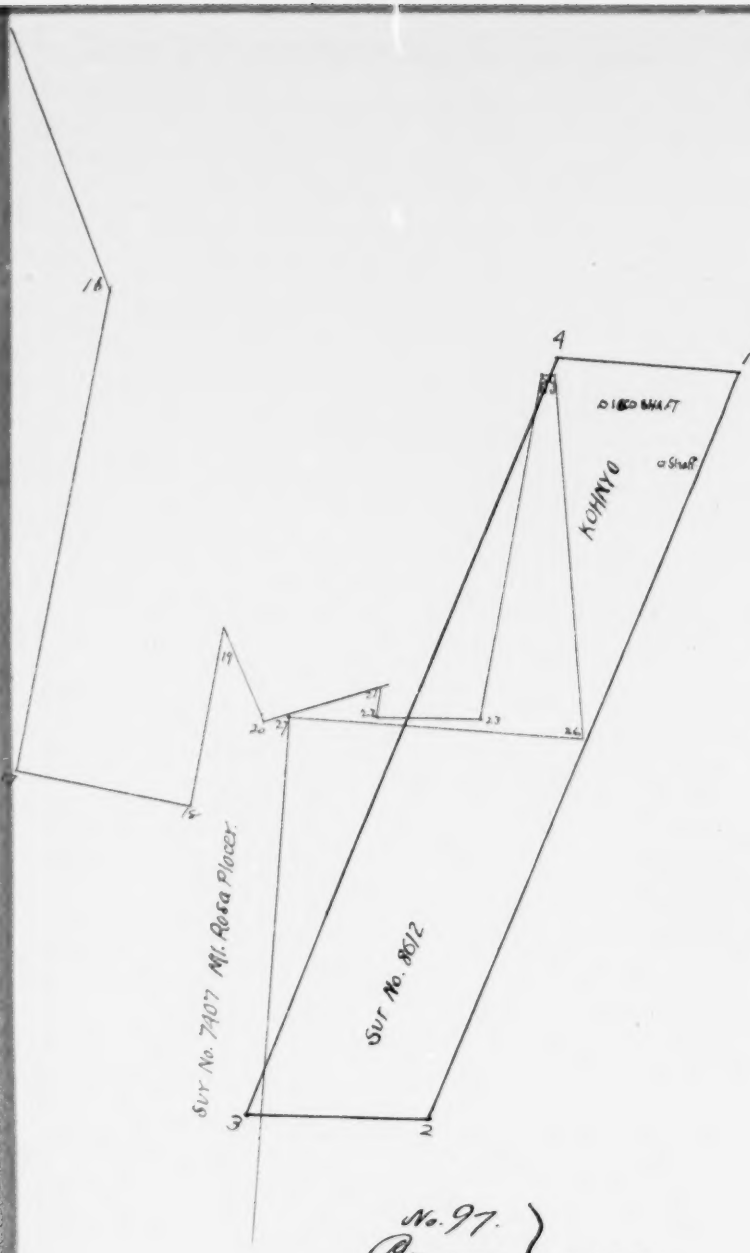
June 17, 1898, there was filed in this office a petition praying that the petitioner be allowed to patent, under its present application, the two detached parts of the Kohnyo lode, for reasons substantially as follows:

116 1. That a well defined mineral bearing vein has been discovered and opened up in each end of the Kohnyo claim.

2. That affidavits now presented show that a conspiracy has been formed to prevent the petitioner from developing the southern end of its claim, so that it has not had a fair opportunity to prove which end of its claim it would prefer to vacate.

3. That the conspiracy is of such proportion as to effect the action of the police courts and justices of the peace to the extent that employees of the petitioner have been arrested and thrown into jail





No. 97.
 Crown } p 119
 v.
 Gurney }

and put under bonds for attempting to work upon ground covered by the receiver's receipt.

4. That the ground is of great value and that the parties desiring to secure the same are closely in touch with the Mt. Rosa Mining and Milling Company, the Woods Investment Company and John McConaghy, who claim some interest in the ground.

There *has* also been filed the affidavit of Charles D. Gurney and W. G. Smith, which, in the main, support the averments contained in said petition.

June 17, 1898, there was received the protest of F. C. Brown, corroborated by John McConaghy, in which the protestant alleges, in effect, that he is the owner of the Scorpion Lode claim in conflict with the southerly portion of the Kohnyo claim; that at date of the Kohnyo entry no mineral had been discovered upon that portion of the claim lying south of the said patented placer claim and that the Kohnyo improvements are situated upon the northerly portion of the claim. The protestant therefore, objects to the allowance of any discretion on the part of the Kohnyo claimant as to which
117 of the two non-contiguous portions of the Kohnyo lode shall be canceled.

June 27, 1898, there was received at this office a protest by John McConaghy, corroborated by H. E. Woods and C. L. Arzens, in which the protestant alleged that the claim of the claimant of the Kohnyo claim was illegal as to all of the ground south and east and south and west of the point where said Kohnyo lode on its strike southwest from the discovery, intersects said patented placer claim, which ground he has embraced in his location of the Hypatia Lode claim.

In view of the fact that no motion for review of the departmental decision of May 7, 1898, affirming the decision rendered by this office May 28, 1895, was filed within the time prescribed by the rules of practice, the decision last mentioned became final and it now devolves upon this office to execute the same.

In view of the foregoing said mineral entry is hereby canceled as to the Kohnyo claim, except as to that portion of the ground lying easterly of line 25-26, survey No. 7407, for the Mt. Rosa patented placer claim.

The claimant of the Kohnyo Lode claim will be allowed sixty days from due notice hereof within which to take the proper steps to have the amended survey made in accordance with the decision of May 28, 1895, and in case of default, said entry will be canceled in its entirety.

Notify parties interested, and at the proper time transmit evidence of service, together with all papers filed and your report. See circular approved October 28, 1886, 5 L. D., 204.
118

Very respectfully,

BINGER HERMANN,

Commissioner.

(B-13)

(Here follows diagram marked p. 119.)

120 And thereafter, and on the 16th day of September, A. D. 1901, the court rendered its findings in said cause, which were in favor of the defendant, and against the plaintiff; to which findings of the court the plaintiff, by his counsel, then and there duly excepted.

And thereupon, and on the same day, the court entered judgment herein in favor of the defendant, and against the plaintiff, in accordance with the findings heretofore rendered herein; to which judgment, and to the entry thereof, the plaintiff, by his counsel, then and there duly excepted.

And thereupon, and on said day, the plaintiff herein prayed an appeal to the supreme court of the State of Colorado, which was allowed upon condition that the plaintiff file within 20 days from this date his appeal bond in the penal sum of \$250, with sureties to be approved by the clerk of this court; and time and until 60 days from this date is allowed the said plaintiff within which to prepare and tender his bill of exceptions by him reserved herein.

And thereafter and on the 4th day of October, 1901, the plaintiff filed his appeal bond herein, which was then and there and on said day approved by the clerk of said court.

And now, forasmuch as the above and foregoing matters and things do not fully appear of record, the plaintiff tenders this,
121 his bill of exceptions herein, and prays that the same may be signed and sealed by the judge of this court, and made a part of the record herein, pursuant to the statute in such case made and provided; which is accordingly done on the 14th day of December, A. D. 1901.

LOUIS W. CUNNINGHAM, [SEAL.]
Judge of the District Court of the Fourth
Judicial District of the State of Colorado.

Tendered to me on this 8th day of November, A. D. 1901.

LOUIS W. CUNNINGHAM, Judge. [SEAL.]

O. K.

POTTER AND McCARTHY,
Attorneys for Defendant.

Endorsed: 219 Filed in the district court of Teller county, Colorado, Dec. 16, 1901. A. W. Grant, clerk; — — deputy.

Endorsed: 4445. Filed in supreme court Jan. 10 1902. Horace G. Clark, clerk.

122 Endorsed: No. 4445. In supreme court, State of Colorado. Charles D. Gurney, appellant, vs. F. C. Brown, appellee. Transcript of record. Bill of exceptions. Assignment of errors. Filed in supreme court this 10th day of Jan., 1902. H. G. Clark, clerk.

123 In the Supreme Court of the State of Colorado.

Pleas before the honorable the supreme court of the State of Colorado, sitting at Denver, in said State, at a term thereof begun and held at the capitol building, in said city, on the second Monday of January, A. D. 1904, and of the Independence of the United States the one hundred and twenty-eighth.

Present: Hon. William H. Gabbert, chief justice, Hon. Robert W. Steele, Hon. John Campbell, justices. Nathan C. Miller, Esq., attorney general, Felix A. Richardson, Esq., bailiff, and Horace G. Clark, Esq., clerk.

Be it remembered, that thereafter and on to-wit: the 5th day of April, A. D. 1904, the following order was entered upon the records of this court:

CHARLES DUNCAN GURNEY, Appellant,	} 4445. Appeal from District Court of Teller County.
<i>vs.</i> F. C. BROWN, Appellee.	

Now comes Joseph C. Helm, Esq., attorney for appellant, and there being no appearance on behalf of the appellee herein, this cause is argued orally and submitted to the consideration and judgment of the court.

124 In the Supreme Court of the State of Colorado.

Pleas before the honorable the supreme court of the State of Colorado, sitting at Denver, in said State, at a term thereof begun and held at the capitol building, in said city, on the second Monday of April, A. D. 1904, and of the Independence of the United States the one hundred and twenty-eighth.

Present: Hon. William H. Gabbert, chief justice, Hon. Robert W. Steele, Hon. John Campbell, justices. Hon. Nathan C. Miller, attorney general, Hon. Felix A. Richardson, bailiff, and Horace G. Clark, Esq., clerk.

Be it remembered that thereafter and on to-wit: the 6th day of June, A. D. 1904, the following judgment was entered of record in this court:

CHARLES DUNCAN GURNEY, Appellant, } 4445. Appeal from the
 vs. } District Court of Teller
 F. C. BROWN, Appellee. } County.

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Teller, as also upon the matters as-
 125 signed for error herein; and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is manifest error in the proceedings and judgment aforesaid of said district court,

It is therefore considered and adjudged by the court, that the judgment aforesaid of said district court be, and the same is hereby reversed, annulled, and altogether held for naught; and *and* that judgment is now here directed to be entered in this court that said appellant do recover the premises included in the Hobson's Choice location of and from the appellee Brown, and that he also recover his costs in this court, as well as in the court below, and that he have execution therefor. And let the opinion of the court filed herein be recorded.

126 CHARLES DUNCAN GURNEY, Appellant, }
 v. } No. 4445.
 F. C. BROWN, Appellee. }

J. A. SMALL, Appellant, }
 v. } No. 4449.
 F. C. BROWN, Appellee. }

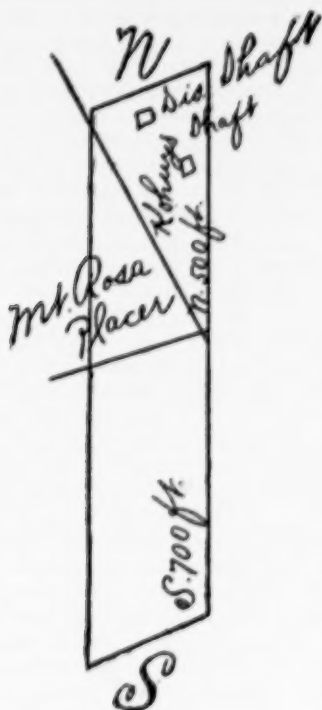
Appeals from the District Court of Teller County.

Chief Justice GABBERT delivered the opinion of the court:

The main question presented for determination in both of these cases is the same, and the mining premises in controversy embraces practically the same tract. For these reasons the two cases will be disposed of in one opinion.

Appellee Brown applied for patent on a mining claim, known as the Scorpion. Appellant Gurney adversed this application as the owner and claimant of the Hobson's Choice, and the appellant Small as the owner and claimant of the P. G. Thereafter each brought suit in support of his adverse claim. The causes were tried on an agreed statement of facts, whereby the main question presented is, when, with respect to the three locations, did the premises

in controversy become subject to location? The following diagram will aid in understanding this question:



127 The facts presenting it are as follows:

From this diagram it will be observed that the Kohnyo was segregated into two disconnected tracts by the Mt. Rosa, a patented placer claim. The north end of the Kohnyo, approximately 500 feet in length, embraced the discovery shaft. The south end was some 700 feet in length, and was without development work of any kind. The local land office permitted the claimant of the Kohnyo to enter the two tracts as one claim, but the Land Department ultimately refused to issue a patent for such tracts, basing such refusal upon the ground that two disconnected portions of a lode mining claim separated by a patented placer could not be included under one location, within the same patent. The land office, however, gave the applicant the privilege of proceeding to patent upon either of the segregated tracts, and directed that in default of an election or appeal by the claimant within sixty days from the date of the order, that the entry of that portion

of the claim lying south of the Mt. Rosa placer should be cancelled without further notice. This decision was rendered May 28th, 1895. No appeal was taken from this decision, but the claimant of the Kohnyo instituted proceedings against the claimant of the Mt. Rosa placer the purpose of which was to secure title to the vein of the Kohnyo, which, it was claimed, passed through the portion of the placer conflicting with the Kohnyo location. These proceedings were prosecuted before the Land Department, with the result that on May 7, 1898, a decision was rendered against the Kohnyo claimant's contention of a known vein in the placer conflict. June 14, 1898, the claimant of the Kohnyo filed in the local land office a written instrument, whereby election was made to retain and patent the north end of the Kohnyo claim, and in which the right to further question or review the decision of the Land Department of May 7, 1898, was waived. July 15, 1898, the Commissioner of the General Land Office cancelled the entry of the Kohnyo claim as to that portion south of the Mt. Rosa placer. May 13, 1898, appellee Brown located this 700 feet as the Scorpion Lode claim. June 23, 1898, appellant Gurney located the same premises as the Hobson's Choice lode, and July 16, 1898, appellant Small located the same ground as the P. G. Lode claim. July 15th and 16th, 1898, the claimant of the Scorpion filed amended and second amended location certificates. On these facts judgment was rendered for defendant in each case, from which the plaintiffs appeal.

Other facts were stipulated, which have not been summarized because they are of that character, and cover such questions, that the rights of the respective claimants to the premises in controversy are wholly dependent upon the legal conclusions deducible from those stated. Counsel for appellee, however, contend that the judgment must be affirmed because the agreed facts fail to identify the premises in dispute as part of the Kohnyo claim; do not establish the validity of that location, nor affirmatively show that the premises, when located as the Scorpion, were not part of the unappropriated public domain. The agreed statement will not bear this construction. It is evident from the record and the briefs of counsel, that the only question submitted for trial and the only one which the parties intended to litigate and have determined by the trial court was the time when the premises in controversy reverted to the public domain, and the judgment respecting their rights which would follow the conclusion of law on this question. Or, in other words, the only question really submitted for trial was the point of time at which the premises in controversy were open to location. Upon the determination of this question, the decision as to which of the respective locations was valid, depended. This is apparent from the agreed statement of facts, for thereby it was conceded that each of the parties litigant had complied with all the requirements of the law in the location of their respective claims, as set forth in their respective pleadings, saving and excepting it was not admitted that at the time of the respective locations the ground in controversy was

subject to location. As to each claim this question was reserved for the decision of the trial court by the following provision: "Provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain."

130 Counsel for appellee concede that the tract in controversy is substantially identical with the south tract of the Kohnyo lode, but say that such fact is not disclosed by the record. If not, it is rather strange that in the preparation of the agreed statement the various steps affecting the Kohnyo location were set out with such particularity. A discussion of the main question in the cases will demonstrate that the stipulated facts do establish the validity of the Kohnyo location, and that at the date of the location of the Scorpion the premises therein included were not a part of the unappropriated public domain. Appellee, however, is estopped from raising any of these questions now. His counsel state in their brief:

"Upon the trial in the court below the stipulation of facts was not read by either party. * * * It was upon taking up the record before this court for the preparation of appellee's brief that the question of the relevancy of the exhibits attached to the stipulation of facts first presented itself, * * *. From an examination of the record it would appear to be a certainty that the case was tried in the lower court upon assumptions which are wholly unsupported by the written evidence contained in the agreed statement of facts. * * * The truth of the matter is, that after the preparation, execution and filing of the agreed facts, the stipulation containing such facts was never again read or digested by any of the parties in interest. The trial court and counsel for all the parties litigant assumed that the stipulation covered facts which, upon investigation, we fail to find."

131 Facts assumed to be true on the trial of a cause cannot afterwards be contested on appeal—2 Cyc., 675. In short, it appears that counsel for both sides, on the trial of the cause, construed the stipulated facts as covering these questions, and on appeal they will be held to that construction. Again, none of these questions were raised in the court below. Had they been, and the attention of the court and counsel been called to the fact that the agreed statement omitted material facts, opportunity would have been afforded to correct the alleged omissions either by further stipulation or testimony. One of the cardinal principles of appellate procedure is, that questions sought to be reviewed shall first be brought before the trial court for decision. Otherwise a court of review would often be compelled to decide purely original questions which the trial court was given no opportunity to decide or determine—Elliott's Appellate Procedure, § 489.

We shall next notice the contention of counsel for appellee, that the premises in controversy were not segregated by the Kohnyo location. In support of this claim, two propositions are relied upon:

(1) The decision of the Land Department of May 7, 1898, to the effect that the Kohnyo vein was not known to exist within the boundaries of the Mt. Rosa placer at the time application for the patent therefor was made; and (2) that the rights of the Kohnyo claimant terminated at the point where the north end of the Kohnyo claim intersected the exterior boundaries of the Mt. Rosa placer. The first proposition is clearly untenable. The proceedings before the Land Department with respect to the Kohnyo vein passing through the conflicting patented placer were for the purpose of determining whether or not such vein was known to exist at the time patent for the placer was applied for. On the evidence submitted the department held that it was not known when the claimants of the Mt. Rosa applied for a patent, and therefore could not be held by the Kohnyo lode. This is radically different from a judgment to the effect that the vein did not pass through the conflicting placer location. The second proposition is equally untenable. The Land Department is a special tribunal created for the purpose of supervising the various proceedings whereby title from the Government to portions of the public domain may be obtained. Its judgment respecting those matters which it must determine in ascertaining whether or not an applicant is entitled to acquire the fee title or patent from the United States is unassailable, except by direct proceedings. In other words, its judgment respecting these matters cannot be attacked collaterally.

Steele v. Smelting Co., 106 U. S., 447;

Smelting Co. v. Kemp, 104 U. S., 633.

In this instance the Land Department had determined that the applicant for patent on the Kohnyo was entitled to a conveyance of one or the other of the two tracts. Whether or not this conclusion was right or wrong cannot be questioned collaterally. If wrong, it was an error which the Land Department committed in the exercise of its jurisdiction over those matters specially entrusted to its supervision and control, and hence, could only be corrected in a direct proceeding instituted for that purpose.

133 This brings us to a discussion and determination of what we have designated as the main question, namely: At what date, with respect to the three locations now asserting rights to the premises in dispute, did such premises become subject to location?

No case is cited by counsel where the propositions presented by the facts narrated and bearing upon this question have been determined, and we must, therefore, analyze the facts and their effect, for the purpose of ascertaining when, according to these facts, the subject matter of the actions reverted to the public domain. This is the important point, because a location of a mining claim can only be made upon unappropriated mineral land—*Armstrong v. Lower*, 6 Colo., 393. The decision of May 28, 1895, did not cancel the entry made by the applicant for patent on the Kohnyo. Thereby the Kohnyo claimant was given the right to elect which of the two tracts

would be selected for patent. In case of failure to make such election, the Government reserved the right to cancel the entry on the south tract. The judgment of the Land Department was to be enforced in one of two ways, whereby one or the other of the tracts would be restored to the public domain, namely: by the election of the Kohuyo claimant, or the affirmative action of the department.

The proceedings instituted by the Kohuyo claimant for the purpose of establishing the existence of a known vein through the Mt. Rosa placer at the time the patent for the latter was applied for cut no figure, for, independent of these proceedings, the fact remains that the judgment of the Land Department of May 28, 1895, was

134 not enforced or given effect until the Kohuyo claimant, by its written declaration filed in the local land office indicated its

intention to proceed to patent on the north tract. This act on the part of the Kohuyo claimant was an express surrender of all rights to the south tract. It operated as an abandonment of any right thereto, and took effect the very moment the declaration of election was filed in the local land office—*Derry v. Ross*, 5 Colo., 295. Up to that time the Land Department, having taken no affirmative action to cancel the Kohuyo entry on the south tract, the claimant might have selected that instead of the north one. Certainly, had such election been made, it could not be successfully claimed on the record before us, that the Scorpion could have established any rights against such selection. This conclusion is inevitable, because, so long as the Kohuyo claimant had rights in the south tract, it was not subject to location by third parties. If, then, this tract could not be located as against the rights of the Kohuyo claimant, an attempted location during the existence of such rights could be of no force or effect, because made at a time when it was not subject to location. The subsequent formal cancellation of the entry on the south tract by the action of the Land Department could add nothing to that which had already taken place by the action of the Kohuyo claimant in surrendering and abandoning all rights to the south tract. Such action on the part of the department only evidenced in another form the fact that the Kohuyo claimant had surrendered title to this tract so far as

135 evidenced by the receiver's receipt, and that all rights thereunder were formally cancelled so far as the Government was concerned. This action, however, was not necessary in order to restore the south tract to the public domain, because, by the judgment of the Land Department, that occurred the moment the Kohuyo claimant complied with that judgment. The action of the department in formally cancelling the entry of the south tract of the Kohuyo claim is only important in view of the fact that counsel for appellee contend that the judgment of May 28, 1895, was self-executing, and that it did not appear from the agreed statement that the Kohuyo entry had not been cancelled in accordance with that judgment (or another, which we have not noticed because we do not deem it material) at the time of the Scorpion location. The Land Department certainly did not treat the judgment of May 28, 1895,

as self-executing, because the Commissioner expressly stated, under date of July 15, 1898, that "it now devolves upon this office to execute the same." This action also establishes the fact that so far as any affirmative act of the Government was concerned, the south tract of the Kohnyo entry was not cancelled until the last mentioned date. It is therefore apparent that the contention of counsel for appellee, that the statement of facts does not establish the validity of the Kohnyo location, nor affirmatively show that on the date of the Scorpion location the premises so claimed were not subject to location, is not tenable, because the premises did not revert to the public domain until the Kohnyo claimant filed its election in the local land office, and up to that time the entry of the south tract of the Kohnyo had not been vacated by any affirmative act on 136 the part of the Land Department. We must, therefore, conclude that the premises in controversy were not subject to location until after the date when the Kohnyo claimant filed in the local land office its election to patent the north tract. This being the conclusion, a brief summary of the facts will indicate which of the three claims constitutes a valid location of the south tract. The election of the Kohnyo claimant was filed in the local land office June 14, 1898. The Scorpion was attempted to be located May 13, 1898. June 23, 1898, the Hobson's Choice lode was located, and July 16th following the P. G. was located. It thus appears that the Scorpion was attempted to be located at a time when the premises were not subject to location; that the Hobson's Choice lode was located when they had reverted to the public domain, and that the location of the P. G. was made after that date; so that the only valid location was the Hobson's Choice.

Counsel for appellee have argued that the suspension of a receiver's receipt operates to render it incompetent as evidence of the validity of the claim upon which it is issued. This proposition may be correct, but the facts do not justify its application. The certificate on the Kohnyo was not suspended or cancelled, but the order of the department was to the effect that the entry itself should be suspended until certain directions were complied with. The mere suspension of a mineral entry for the purpose of requiring compliance with departmental regulations 137 does not destroy the force of the certificates evidencing such entry, or enable third parties to attack its validity—§ 772, 2 Lindley on Mines; *Last Chance M. Co. v. Tyler M. Co.*, 61 Fed., 557. Counsel for appellee, as we understand their brief, have also advanced the proposition that the judgment of the Land Department of May 28, 1895, not having been appealed from, operated to cancel the entry at the expiration of the date when the time allowed for appeal expired. We think this contention has already been answered, but the authorities they cite to support their claim are not in point. In *U. S. v. Steenerson*, 50 Fed., 504, as well as in *Murray v. Polglase*, 43 Pac. (Mon.), 505, it was held that according to the judgment of the Land Department, the respective entries had

been cancelled ; and so in the cases of Reed, 6 L. D., 563, Gauger, 10 L. D., 221, and Perrott v. Connick, 13 L. D., 598. As we have already shown, a judgment of absolute cancellation is entirely different from one where the entry is merely suspended for the purpose of enabling the applicant to comply with some specific requirement.

But one further matter requires notice, namely : The filing on the part of the Scorpion claimant of amended and second amended location certificates July 15 and 16, 1898, or, as it is claimed on behalf of his counsel, he made amended locations of his claim on these dates. These acts in no manner changed or enlarged his rights, for prior thereto, the premises had been claimed and located as the Hobson's Choice, at a time when the premises thereby included were open to location.

138 As those cases were tried in the court below on an agreed statement of facts, which definitely determines the rights of the respective parties, judgments in each case will be directed here under the authority of § 398 of the Civil Code. The judgment in Small v. Brown is vacated, and judgment will be entered in this court that neither party has established any right to the premises in controversy, and that each pay his own costs in this court as well as in the court below. In Gurney v. Brown it appears from the facts stipulated (considering those not specially noticed in the opinion), that the location of the Hobson's Choice is in all respects regular ; that appellant Gurney is the owner of, and has established his right to the possession and occupancy of the premises embraced in, such location, and is entitled to recover the same from the appellee by virtue of a full compliance with the statutes of the United States and the State of Colorado in the discovery and location of the Hobson's Choice Lode miningclaim. Wherefore, judgment is now here directed to be entered in this court that he do recover the premises included in the Hobson's Choice location of and from the appellee Brown, and that he also recover his costs in this court, as well as in the court below.

Judgments vacated and judgments entered in this court.

Endorsed : Filed in supreme court Jun- 6 1904. Horace G. Clark, clerk.

139 Be it remembered, that afterwards and on to-wit : the 20th day of June, A. D. 1904, the following order was entered of record in this office.

CHARLES DUNCAN GURNEY, Appellant,	} 4445. Appeal from the District Court of Teller County.
vs. F. C. BROWN, Appellee.	

At this day, upon consideration thereof, it is ordered by the court, that the motion of appellee herein, to extend the time for filing his petition for rehearing herein to June 23rd, 1904, be, and the same is hereby allowed.

140 In the Supreme Court of the State of Colorado.

CHARLES DUNCAN GURNEY, Appellant,	} No. 4445. Petition for Rehearing.
<i>vs.</i>	
F. C. BROWN, Appellee.	}

Now comes the above named appellee, F. C. Brown, who prays the honorable court to grant a rehearing in this cause on the following grounds, to-wit:

First. This court erred in holding "that the rights of the Kohnyo claimant did not terminate at the point where the north end of the Kohnyo claimant intersected the exterior boundaries of Mt. Rosa placer claim," because,

(a.) On May 28th the Commissioner of the General Land Office rendered his decision, declaring expressly as follows: "The right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts."

(b.) Because, there is no provision of law, giving to lode claimant the right to include ground not contiguous to that containing its discovery, where the tract is intersected and cut in two by a patented placer claim

(c.) Because, no discovery of mineral was ever made or attempted to be made by the Kohnyo claimant-upon any part of their location, except the northerly tract, containing the original
141 discovery and the premises in controversy in this suit were never segregated by the Kohnyo location.

Second. The court erred in holding that upon the record in this case, the Kohnyo claimant was entitled to a conveyance of the southerly tract which was separated from the discovery by the Mt. Rosa placer, because,

(a.) The Commissioner of the General Land Office, in his judgment of May 28th, 1895, after declaring that the right to the Kohnyo lode terminated where it intersected the placer and was, therefore, confined to the northerly tract, imposed conditions amounting to a condition precedent, the fulfillment of which, within a stated period, would allow the claimant the right to select the southerly tract and patent same. The Commissioner says:

"The claimant company may, however, elect which of said tracts it desires to retain, the five hundred feet on the north or the southerly seven hundred feet. If the latter tract is retained, evidence of discovery of mineral thereon and the statutory expenditure of five hundred dollars (\$500.00) must be submitted. Claimant will be allowed sixty (60) days in which to furnish required evidence or to appeal in default of which the entry will be cancelled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice from this office."

(b.) The fact that the Kohnyo claimant was allowed the privilege

of complying with the mining laws with respect to the southerly tract and of furnishing evidence within sixty (60) days of the
142 discovery of mineral thereon, and of the statutory expenditure of the five hundred dollars (\$500.00) to secure patent, did not give to said claimant any rights in said tract of land, nor reduce the southerly tract to the condition of occupied mineral land, it having been expressly decided, that the Kohnyo claimant had no rights whatever in that piece of ground and could have none until the conditions prescribed were strictly complied with.

(c.) The holding of this court makes the mere privilege of initiating right to possession through the compliance with the mining laws, tantamount to the ownership of the actual right itself.

(d.) The holding of this court establishes that the Kohnyo claimant was entitled to a right to the southern tract and the right to patent same without, in any way, complying with the mining laws and without taking due and proper steps to comply with the judgment of the Land Office, expressly reciting the conditions upon which any rights could be secured.

Third. The court erred in holding that the decision of the Commissioner of the General Land Office, under date of May 28th, 1895, had not become operative at the time of the Scorpion location, because,

(a.) Said decision provided "claimant will be allowed sixty (60) days in which to furnish the required evidence or to appeal in default of which the entry will be cancelled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer
143 claim, without further notice from this office." And, because, it is an admitted fact that the foregoing requirements in said decision were never complied with within the time specified, or at all.

(b.) The Kohnyo claimant could not comply with the conditions required by said decision, except in the specified manner stated, therefore, no rights of the Kohnyo claimant in or to said southerly tract, could arise out of the mere act of selection of said tract, regardless of the intervening time and the actions of others, but could only arise by a due appropriation of said tract in the discovery of mineral thereupon, as required by the mining laws and by due compliance with the terms of the decision in furnishing, within sixty (60) days, the necessary evidence required.

(c.) Because, a judgment rendered, as in this case, by the Land Department, holding an entry for cancellation, becomes operative from the time rendered, and the ground subject to location by another.

(d.) Because, the original judgment of the Land Office, under date of May 28th, 1895, has never been changed or qualified in any manner. The Kohnyo claimant did not, within the sixty (60) days, allowed by the judgment, or at any other time, furnish the required evidence of discovery of mineral or five hundred (\$500.00) dollars improvements on the southerly tract and never made selection of any

ground except that which the judgment of May 28th, 1895, said they were entitled to.

(e.) Because, no selection having been made within the sixty (60) days, and no evidence having been furnished as required, the Kohnyo claimants lost whatever rights (if any) they ever had, in the southerly tract, by operation of law.

144 Fourth. The court erred in holding that the written declaration of the Kohnyo claimant, filed in some other proceeding, in which, said claimant states that it "waives the right of review of the last named decision and elects to retain in said M. E. No. 573, that portion of the Kohnyo lode claim which is described in the above mentioned letter of the Commissioner as the 'five hundred (500) feet on the north,'" was an express surrender of all rights of said claimant to the south tract and operated as an abandonment of any right thereto and took effect the very moment the declaration was filed in the local land office, because,

(a.) At the time said instrument was filed, the Kohnyo claimant had no rights in said south tract, for the reason that they had never complied with the judgment of the Land Department and had never furnished the required evidence of the performance of the conditions precedent, stated in said judgment.

(b.) Because, said so called selection was simply an acquiescence in the judgment of May 28th, 1895, declaring that "the right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim."

(c.) Because, until mineral had been discovered on said southerly tract, the Kohnyo claimant had no rights therein which could be surrendered or abandoned.

(d.) Because, no affirmative action aside from the judgment of May 28th, 1895, of the Land Department, was necessary to cancel the Kohnyo entry on the south tract and no self serving act of the
145 claimant in deciding to patent the tract of ground containing his discovery shaft, could have the effect of restoring to the public domain, land in which he had no right or title.

Fifth. The court erred in holding that the Kohnyo claimant had any right whatsoever in the southerly tract at the time of the Scorpion location, because,

(a.) Under the departmental decision of May 28th, 1895, it had been expressly established as the law, that the Kohnyo claimant had no right to grounds beyond the boundaries of the intersected Mt. Rosa placer claim, and, having no right to said ground at the date mentioned, the Kohnyo claimant could have none when the Scorpion lode was located, all conditions remaining the same at that date.

(b.) Because, no right whatsoever in said southerly tract, could ever be acquired by the Kohnyo claimant, except by the discovery of mineral thereupon as required by the mining laws.

(c.) Because, said claimant had wholly failed and refused to comply with the judgment of the Land Department, in allowing him to select said southerly tract within sixty (60) days' time, after May

28th, 1895, by making such discovery of mineral and doing the five hundred (\$500.00) dollars' necessary patent work, and furnishing the required evidence of these facts, and only by complying with such conditions, could the Kohnyo claimant ever establish any right in said southerly tract.

Sixth. The court erred in holding that the southerly tract was only restored to the public domain by action of the Kohnyo claimant, in deciding to patent the northerly tract, which contained the original discovery, because,

146 (a.) Under the holding of the Commissioner of the General Land Office, before referred to, the Kohnyo claimant had no right, at any time, to the southerly tract.

(b.) After the judgment of May 28th, 1895, the southerly tract was, up to the time of the location of the Scorpion claim, unappropriated mineral land, and, upon the location of the Scorpion claim, was duly segregated.

(c.) Because, at the time the Kohnyo claimant made and filed his statement accepting the decision of the Land Department, which declared he had no right to the southerly tract, the ground in controversy had been duly located and appropriated by the Scorpion lode.

(d.) Because, the mere acquiescence upon the part of the claimant, in the judgment of the Land Department, and no attempt upon his part to ever acquire the title to the southerly tract, does not operate as a restoration to the public domain of that to which the claimant never had any right or title.

Seventh. The court erred in holding that the judgment of the Commissioner of the General Land Office, under date of May 28th, 1895, did not amount to a cancellation, because,

(a.) The holding for cancellation is in law an equivalent of absolute cancellation.

(b.) The time within which the judgment was, by its terms, to be complied with, in the event claimant desired to secure title to the southerly tract, fully elapsed without such compliance being made or an appeal taken.

147 (c.) Because, no stay or supersedeas was had in reference to said departmental decision lengthening or extending the time in which the conditions mentioned were to be complied with.

(d.) Because, claimant had the right of appeal to the Secretary of the Interior, which right was absolutely waived.

Eighth. The court erred in holding that the order of the department, of May 28th, 1895, was to the effect that the entry, itself, should be suspended until certain directions were complied with, because,

(a.) It appears from such order or decision of the department, that the entry was not suspended, but cancelled to the extent of the southerly tract, without further notice, provided the claimant did not appeal or furnish the required evidence within sixty (60) days.

(b.) Because, such order or decision of the department was not

made for the purpose of requiring the compliance upon the part of the claimant with certain departmental regulations, but on the contrary, absolutely fixed and determined the rights of the claimant and gave him the usual time in which to appeal from the decision to the Secretary of the Interior.

Ninth. For the reasons above set forth and others which will appear in the argument and brief accompanying this petition, the court erred in holding that the ground in controversy was not subject to location at the time the appellee located his Scorpion lode.

148 Wherefore, because of the facts set forth herein and, because the decision of your honors, rendered in this case, completely wipes out and destroys what appellee believes to be valuable property rights, to which he is entitled, this petition is respectfully submitted, with the prayer that a rehearing be granted in this case.

CHARLES F. POTTER,
Attorney for F. C. Brown, Appellee.

149 Endorsed: No. 4445. In the supreme court of the State of Colorado. Charles Duncan Gurney, appellant, v. F. C. Brown, appellee. Petition for rehearing. Filed in supreme court Jun- 23 1904. Horace G. Clark, clerk. Charles F. Potter, attorney, 302 Boston building, Denver, Colo.

150 And afterwards and on to-wit: the 27th day of June, A. D. 1904, the following order was entered of record in this office:

CHARLES DUNCAN GURNEY, Appellant,	} 4445. Appeal from the District Court of Teller County.
vs. F. C. BROWN, Appellee.	

At this day, upon consideration thereof, it is ordered by the court, that the petition of appellee for a rehearing herein be, and the same is hereby denied.

151 I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original transcript of record, bill of exceptions, assignment of errors, opinion of this court, petition for rehearing, and all orders of court entered herein, as the same now remain on file and of record in this office.

Witness my hand and seal of said court, affixed at my office, in the city of Denver, this 12th day of Aug., A. D. 1904.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK, Clerk,
By JOHN B. COOKE, Deputy.

152

In the Supreme Court of the United States.

FRANK COLE BROWN, Heretofore Designated as F. C. Brown, Plaintiff in Error,	} No. —. Error to the Supreme Court of the State of Colorado.
vs.	
CHARLES DUNCAN GURNEY, Defendant in Error.	}

Comes now the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause the supreme court of the State of Colorado erred to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice, and against the rights of the plaintiff in error in the following particulars, to-wit:—

(1.) The said supreme court erred in over-ruling and setting aside the judgment of the trial court, because, under the agreed statement of facts, and the laws of the United States relating to the control and disposition of its public mineral lands by the Department of the Interior, plaintiff in error was entitled to his judgment.

(2.) The said supreme court erred in directing judgment to be entered in said court against plaintiff in error and in favor of defendant in error, because, under the agreed statement of facts, and the laws of the United States relating to the control and disposition of the public mineral lands by the Department of the Interior, the defendant in error was not, and is not, entitled to judgment against the plaintiff in error, or to recover the premises in controversy.

(3.) The said supreme court erred in not giving due force and effect to the decision of the Land Department of the Government of the United States, to wit:—the decision of the Commissioner of the General Land Office, dated May 28, 1895, which expressly declared that the right to the lode terminated where it intersected and passed within the exterior boundaries of the patented placer claim, which placer claim divided the lode claim into two separate and distinct tracts.

(4.) The said supreme court erred in construing and determining the decision of the Land Department of the Government of the United States, to-wit:—the decision of May 28, 1895, and the statutes and laws of the United States relating to the sale and disposition of its mineral lands by the said Land Department, in such a manner as to hold that the southerly seven hundred (700) feet of the lode location in question, was a part of the Kohnyo claim, until June 14, 1898, and that the judgment of cancellation of May 28, 1895, did not become operative prior to June 14, 1898, and that such judgment of cancellation was not conclusive and binding upon the supreme court of Colorado.

(5.) The said supreme court erred in holding that under the decision of the General Land Office of date, May 28, 1895, and the statutes and laws of the United States relating to the sale and dis-

position of its mineral lands, the lode claimant ever had or could have any right, title or interest in the southerly seven hundred (700) feet of the Kohnyo claim, or right to enter same for patent, without first making a discovery of mineral thereupon, and making proof of such discovery to the Land Department, together with proof of the statutory expenditure of five hundred (\$500.00) dollars for the purpose of obtaining patent.

(6.) The said supreme court erred in holding that, upon the record in this case, the Kohnyo claimant was entitled to a conveyance of the said southerly tract, or to enter same in the United States Land Office for patent.

(7.) The said supreme court erred in not holding that under the judgment of the Land Department of May 28, 1895, the interest of the claimant in the said southerly tract—the premises in controversy in this suit—depended entirely upon the performance of conditions precedent, to-wit:—the discovery of mineral and the performance of five hundred (\$500.00) dollars patent labor, and the failure to perform the conditions within the stated time, lost to claimant the right of selection mentioned in such judgment.

(8.) The said supreme court erred in not giving due and proper effect and consideration to the decision of the Department of the Interior, of May 28, 1895, which held that a lode claim, intersected by a patented placer, cannot be allowed to include ground, not contiguous to that containing the discovery, and that the right to the lode claim in question, terminated where it intersected and passed within the exterior boundaries of the patented placer claim; and erred, in not holding that such judgment and decision was binding upon the supreme court of Colorado.

(9.) The said supreme court erred in holding that the judgment of the Land Department, of May 28, 1895, was without force or effect until the Kohnyo claimant, by its written declaration, filed in the local land office, indicated its intention to patent the *north tract*, which had always been recognized as valid and which contained the discovery workings of the claim.

(10.) The said supreme court erred, in holding that the act on the part of the Kohnyo claimant in filing the written declaration known as "Exhibit H" in the Land Office, was in and by itself alone, the means of determining—under the judgment of the Land Department of May 28, 1895—when the ground in controversy in this suit became public domain. And in holding that the rights of the parties to this litigation must be determined solely by the act of filing said written declaration of June 14, 1898, and not by the judgment of the Land Department.

155 (11.) The said supreme court erred in holding that under the statutes and laws governing the sale and disposition of the public mineral domain, and the control and power of the Department of the Interior over same, the judgment of the Land Department of May 28, 1895, was not, and could not be the means

of cancelling the Kohnyo entry upon the premises in controversy, until the said Kohnyo claimant filed in the local land office the instrument known as "Exhibit H;" and in virtually holding that said judgment was without force or effect until more than three years after it was rendered.

(12.) The said supreme court erred in holding that the premises in controversy in this suit, did not revert to the public domain, and was not a part of the public domain until June 14, 1898, when the Kohnyo claimant filed "Exhibit H" in the local land office.

(13.) The said supreme court erred in holding that the said decision of the Land Department, of May 28, 1895, was not a judgment of cancellation, as to the premises in controversy in this suit.

(14.) The said supreme court erred in holding that the judgment of May 28, 1895 of the Land Department of the Government did not—as to the premises in controversy in this suit—become final sixty (60) days after same was rendered, and thereupon, become conclusive and binding upon the Kohnyo claimant and upon the courts.

(15.) The said supreme court erred in holding that the judgment of the Land Department of May 28, 1895, which allowed the claimant sixty (60) days in which to furnish the required evidence, or to appeal—in default of which, the entry would be cancelled to the extent of the premises in controversy—did not become a final judgment upon the failure of the claimant to either appeal or furnish the evidence required; and in holding that, under the said judgment, the land did not—at the end of said sixty (60) days' time (there being no appeal or proofs furnished)—become subject to location and entry by the first legal applicant.

(16.) The said supreme court erred in holding, that under the statutes and laws of the United States relating to its mineral lands, and the control, sale and disposition of same by the Department of the Interior, the premises in controversy *was* not public mineral domain, and subject to location by plaintiff in error, on May 13, 1898, when he located his Scorpion Lode claim.

(17.) The said supreme court erred in not affirming the judgment of the trial court, giving to plaintiff in error, his rights under the statutes and laws of the United States, as the first legal locator and applicant for the mineral premises in controversy.

Wherefore, for these and other manifest errors which appear in the record in this case, said Frank Cole Brown, plaintiff in error, prays that the judgment of the said supreme court of Colorado be reversed and set aside, and held for naught, and that the judgment of the trial court be affirmed and reinstated, giving and granting to the plaintiff in error, his rights under the statutes and laws of the United States; plaintiff in error, also prays judgment for his costs.

CHARLES F. CONSAUL,

Bond Building, Washington, D. C.,

CHARLES F. POTTER,

302 Boston Building, Denver, Colo.,

Attorneys for Frank Cole Brown, Plaintiff in Error

156½ [Endorsed:] No. —. In the Supreme Court of the United States. Frank Cole Brown, heretofore designated as F. C. Brown, plaintiff in error, vs. Charles Duncan Gurney, defendant in error. Assignments of error. Filed in supreme court, Aug. 5 1904 Horace G. Clark clerk.

157 In the Supreme Court of the State of Colorado.

CHARLES DUNCAN GURNEY, Appellant,	} No. 4445. Petition for Writ of Error.
<i>vs.</i> F. C. BROWN, Appellee.	

Comes now the above named F. C. Brown, appellee, and says; That on the 6th day of June, A. D. 1904, judgment in this case was entered by this court in favor of Charles Duncan Gurney, appellant, and against F. C. Brown, appellee, and thereafter, a petition for rehearing was filed, presented, considered, and on the 27th day of June, A. D. 1904, denied by the court, whereupon said judgment became final; that said F. C. Brown was, and is aggrieved in, that, in said judgment and the proceedings had prior thereto in this case, certain errors were committed to his prejudice; that this is an action brought under the statutes of the United States, relating to the mineral lands of the United States, and the control of same by the Department of the Interior, and the sale and patenting of same to citizens of the United States, and under and by virtue of said statutes, the said F. C. Brown claims title to and the right to patent certain mineral lands in the State of Colorado, and that by this action, there was drawn in question, the construction of certain of said statutes and the decision of this court is against said title and right claimed by the said F. C. Brown, appellee, and, as he believes, contrary to the statutes of the United States, relating to the sale and disposition of its mineral lands and against the title and right of said F. C. Brown, thereunder, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, said F. C. Brown prays that a writ of error may issue to the supreme court of the State of Colorado for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein, may be sent to the United States Supreme Court.

CHARLES F. CONSAUL,
CHARLES F. POTTER,
Attorneys for F. C. Brown.

158 In the Supreme Court of the State of Colorado.

CHARLES DUNCAN GURNEY, Appellant,	} No. 4445. Allowance of Writ of Error.
<i>vs.</i> F. C. BROWN, Appellee.	

Comes now F. C. Brown, the appellee above named, on this 5th day of July, A. D. 1904, and files and presents to this court, his petition, praying for the allowance of a writ of error intended to be urged by him; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States, the questions therein presented, it is ordered by this court that a writ of error be allowed, as prayed, provided, however, that said F. C. Brown, appellee, give bond according to law in the sum of two thousand (2000) dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 5th day of July, A. D. 1904.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court
of the State of Colorado.

158½ [Endorsed:] No. 4445. In the supreme court of the State of Colorado. Charles Duncan Gurney, appellant, *vs.* F. C. Brown, appellee. Petition for writ of error and allowance of same. Filed in supreme court, Jul-6, 1904. Horace G. Clark, clerk. Charles F. Potter, attorney, 302 Boston building, Denver, Colo.

159 In the Supreme Court of the United States.

FRANK COLE BROWN, Heretofore Designated as F. C. Brown, Plaintiff in Error,	} Bond for Security upon Writ of Error.
<i>vs.</i> CHARLES DUNCAN GURNEY, Defendant in Error.	

Know all men by these presents, that we, Frank Cole Brown, of the county of Pueblo, State of Colorado, as principal, and Kate M. Woods, Harry Edwin Woods and Roselpha Green, of the county of El Paso, State of Colorado, as sureties, are held and firmly bound unto the above named Charles Duncan Gurney in the sum of two thousand (\$2000.00) dollars, to be paid to the said Charles Duncan

Gurney, and for the payment of which well and truly to be made, we bind ourselves and each of us, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the thirtieth day of July, in the year of our Lord, one thousand nine hundred and four.

Whereas, the above named Frank Cole Brown, plaintiff in error, seeks to prosecute his writ of error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the supreme court of the State of Colorado.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void, otherwise, to remain in full force and virtue.

F. C. BROWN.	[SEAL.]
FRANK COLE BROWN.	[SEAL.]
ROSELPHIA GREEN.	[SEAL.]
KATE M. WOODS.	[SEAL.]
HARRY EDWIN WOODS.	[SEAL.]

STATE OF COLORADO, } ss:
County of El Paso, }

Harry Edwin Woods, whose name is subscribed as surety to the above bond, being first duly sworn, says, that he is a resident and freeholder of the State of Colorado, and is worth more than the sum in said bond specified as the penalty thereof, over and above all his just debts and liabilities, in property not exempt by law from execution in this State.

HARRY EDWIN WOODS.

Subscribed and sworn to before me, this 2nd day of August, A. D. 1904.

My commission expires Oct. 11, 1907.

[SEAL.]

LINUS E. SHERMAN,
Notary Public.

161 STATE OF COLORADO, } ss:
County of El Paso, }

Kate M. Woods and Roselphia Green, whose names are subscribed as surety to the above bond, being severally and duly sworn, each for herself says, that she is a resident and freeholder of the State of Colorado, and is worth more than the sum in said bond specified as the penalty thereof, over and above all her just debts and liabilities in property not by law exempt from execution in this State.

ROSELPHIA GREEN.
KATE M. WOODS.

Subscribed and sworn to before me, this thirtieth day of July,
A. D. 1904.

My commission expires December 31, 1906.

MARY L. RICHARDSON,
Notary Public.

This bond approved this fourth day of August, A. D. 1904.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court
of the State of Colorado.

Endorsed: No. — In the Supreme Court of the United States.
Frank Cole Brown, heretofore designated as F. C. Brown, plaintiff
in error, vs. Charles Duncan Gurney, defendant in error. Bond.
Filed in supreme court Aug. 5 1904. Horace G. Clark, clerk.

162 The original of the foregoing supersedeas bond was lodged
with the clerk of the supreme court of the State of Colorado
on the fifth day of August, A. D. 1904, and the following indorse-
ment made thereon:

Bond. Filed, August 5, 1904. Horace G. Clark, clerk supreme
court.

163 Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the justices of
the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of
the judgment of a plea which is in the said supreme court of the
State of Colorado, before you, at the June sitting of the April term
1904 thereof, being the highest court of law or equity of the said
State, in which a decision could be had in the said suit between
Charles Duncan Gurney plaintiff and appellant, and Frank Cole
Brown designated as F. C. Brown defendant and appellee, wherein
was drawn in question the validity of a treaty or statute of, or an
authority exercised under, said State, on the ground of their being
repugnant to the Constitution, treaties, or laws of the United States,
and the decision was in favor of such their validity; or wherein was
drawn in question the validity of a treaty or statute of, or an au-
thority exercised under, the United States, and the decision was
against their validity; or wherein was drawn in question the con-
struction of a clause of the Constitution, or of a treaty, or statute
of, or commission held under the United States, and the decision
was against the title, right, privilege, or exemption specially set up
or claimed under such clause of the said Constitution, treaty, stat-

ute, or commission; a manifest error hath happened to the great damage of the said Frank Cole Brown as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifth day of August, in the year of our Lord one thousand nine hundred and four.

Done in the city and county of Denver, with the seal of the circuit court of the United States for the district of Colorado attached.

[Seal United States Circuit Court, District of Colorado.]

ROBERT BAILEY,

Clerk of the Circuit Court of the United States,
District of Colorado.

Allowed by

WILLIAM H. GABBERT,

Chief Justice of the Supreme Court of the
State of Colorado.

163½ [Endorsed:] No. —. In the Supreme Court of the United States. Frank Cole Brown, plaintiff in error, vs. Charles Duncan Gurney, defendant in error. Writ of error to the supreme court of the State of Colorado. Filed this — day of August, 1904. — — —, clerk supreme court. Filed in supreme court, Aug. 5, 1904. Horace G. Clark, clerk.

164 The original of the foregoing writ of error was lodged with the clerk of the supreme court of the State of Colorado on August fifth, 1904, and also at the same time and place, a copy thereof for the defendant, Charles Duncan Gurney, said copy being addressed personally to said defendant. The following indorsement was made upon the said original writ and upon each copy:

Writ of error. Filed, August 5, 1904. Horace G. Clark, clerk supreme court.

165

Citation.

UNITED STATES OF AMERICA, ss :

The President of the United States to Charles Duncan Gurley, Colorado, Greeting :

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Colorado, wherein Frank Cole Brown is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the supreme court of the State of Colorado, this fifth day of August, 1904.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court
of the State of Colorado.

Attest :

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court
of the State of Colorado.

CITY AND COUNTY OF DENVER, }
State of Colorado. }

AUGUST 5TH, 1904.

I, the undersigned, Charles Duncan Gurney, the defendant in error of the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

CHARLES DUNCAN GURNEY,
Defendant in Error.

165½ [Endorsed:] No. — In the Supreme Court of the United States. Frank Cole Brown, plaintiff in error, vs. Charles Duncan Gurney, defendant in error. Citation. Filed this — day of August, 1904. — — —, clerk supreme court. Filed in supreme court, Aug. 13, 1904 Horace G. Clark, clerk.

166

Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Colorado, } ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said supreme court, in the city and county of Denver, this 20th day of August, A. D. 1904.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado,
By JOHN B. COOKE, Deputy.

Costs of Suit.

Plaintiff's costs, —, paid by Charles Duncan Gurney.

Defendant's costs, —, paid by Frank Cole Brown.

Costs of transcript, \$85.60, paid by Frank Cole Brown.

Clerk of the Supreme Court of the State of Colorado.

Endorsed on cover: File No. 19,469. Colorado supreme court.
Term No. 97. Frank Cole Brown, plaintiff in error, *vs.* Charles
Duncan Gurney. Filed September 5th, 1904. File No. 19,469.

(19,470 & 19,471.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 98.

JOSIAH APPLETON SMALL, PLAINTIFF IN ERROR,

vs.

FRANK COLE BROWN.

No. 99.

FRANK COLE BROWN, PLAINTIFF IN ERROR,

vs.

JOSIAH APPLETON SMALL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

INDEX.

	Original.	Print.
Caption.....	1	1
Assignment of errors.....	2	1
Transcript from the district court of Teller county.....	5	3
Caption.....	6	3
Complaint.....	8	3
Summons and return.....	14	7
Answer.....	17	8
Stipulation to submit cases on agreed statement.....	20	10
Stipulation as to setting case for trial.....	22	11

	Original.	Print
Orders setting cause and resetting same	23	11
Order consolidating cases	24	12
Order waiving jury and submitting case on agreed statement of facts	24	12
Order submitting cause	25	12
Order that decree be entered in favor of defendant	27	13
Judgment and decree	28	14
Order allowing appeal	31	15
Appeal bond	32	16
Clerk's certificate	35	17
Plaintiff's bill of exceptions	36	18
Agreed statement of facts	37	18
Exhibit A—Decision of Commissioner, May 28, 1895..	48	24
B—Decision of Commissioner, Sept. 16, 1895..	50	25
C—Decision of Commissioner, Jan. 8, 1898..	54	27
Diagram	64	32
D—Decision of Commissioner, Feb. 5, 1896..	65	33
E—Decision of Acting Secretary, April 7, 1896..	70	35
Diagram	72	36
F—Decision of Commissioner, Oct. 22, 1897..	73	37
G—Decision of Secretary, May 7, 1898.....	88	45
H—Affidavit of Lyman B. Goff.....	100	51
I—Decision of Commissioner, April 27, 1899..	101	52
J—Decision of Commissioner, July 31, 1899..	107	55
K—Decision of Commissioner, July 15, 1898..	112	57
Diagram	118	59
Judge's certificate to bill of exceptions....	120	60
Endorsement on transcript, &c.....	121	60
Judgment	122	61
Opinion	123	61
Order extending time for rehearing.....	137	69
Petition for rehearing by Brown	138	69
Petition for rehearing by Small.....	147	73
Order denying petition for rehearing.....	152	75
Clerk's certificate.....	153	75
Assignment of errors by Small	154	76
Assignment of errors by Brown.....	158	78
Petition for writ of error by Brown.....	162	81
Order allowing writ of error to Brown.....	163	82
Petition for writ of error by Small.....	164	83
Order allowing writ of error to Small.....	165	83
Bond of Brown	166	84
Bond of Small.....	170	86
Writ of error in Small vs. Brown.....	174	87
Writ of error in Brown vs. Small.....	176	89
Citation to Brown	178	90
Citation to Small.....	180	91
Returns to writs of error	182	92

1

No. 4449.

In the Supreme Court of the State of Colorado.

Pleas before the honorable the supreme court of the State of Colorado, sitting at Denver, in said State, at a term thereof begun and held at the capitol building, in said city, on the second Monday of January, A. D. 1902, and of the Independence of the United States the one hundred and twenty-sixth.

Present: Hon. John Campbell, chief justice, Hon. William H. Gabbert, Hon. Robert W. Steele, justices, Hon. Chas. C. Post, attorney general, Felix A. Richardson, Esq., bailiff, and Horace G. Clerk, clerk.

Be it remembered, that heretofore and on to-wit: the 14th day of January, A. D. 1902, there were filed in the office of said clerk of said supreme court a certain transcript of record, bill of exceptions and assignment of errors; and contained in and made a part of said transcript of record, bill of exceptions and assignment of errors were writings in words and figures as follows, to-wit:

2

In the Supreme Court of the State of Colorado.

J. A. SMALL, Appellant,	{	No. —. Appeal from the District Court of Teller County.
vs. F. C. BROWN, Appellee.		

Assignment of Errors.

Comes now the appellant above named by his attorney, John Knowles, and respectfully shows this honorable court that there is manifest error in the record, proceedings and judgment entered in the above entitled cause in this, to-wit:

First. That the trial court erred in finding the issues joined for the appellee F. C. Brown for the reason that it clearly appears from the agreed statement of facts upon which this cause was tried (folios 75 to 104) that at the date of the location by appellant of his P. G. Lode mining claim the ground included within the exterior boundaries of the P. G. Lode mining claim was a part of the public domain of the United States open to location and appropriation under the laws of the United States and the laws of the State of Colorado, and that by virtue of a prior appropriation thereof by the appellant as the P. G. Lode mining claim, appellant was and is the owner thereof.

Second. That the trial court erred in finding that the appellee

3 F. C. Brown has established his right and title, and is entitled to the possession and occupancy of all of the ground in controversy herein, to-wit: all of the conflict area between the P. G. Lode mining claim, claimed by appellant, and the Scorpion Lode mining claim, owned by appellee, by reason of a full compliance with all and singular the acts of Congress and the statutes of the State of Colorado relating to the discovery, location and appropriation of lode mining claims upon the public mineral domain of the United States; for the reason that the agreed statement of facts upon which this cause was tried (folios 75 to 104) clearly shows that at the date of the pretended discovery and location of appellee's alleged Scorpion Lode mining claim, to-wit, on May 13, 1898, the ground included within the boundaries of said Scorpion Lode mining claim was not a part or parcel of the public mineral domain of the United States, and was not open to discovery, location and appropriation by the appellee as a mining claim under the laws of the United States and the laws of the State of Colorado.

Third. The trial court erred in entering judgment herein for the appellee upon the findings specified in paragraph- one and two hereof for the reason that the agreed statement of facts upon which this case was tried (folios 75 to 104) shows that the appellant's discovery, location and appropriation of the premises in controversy as the P. G. Lode mining claim was made upon the public domain of the United States in pursuance of the statutes of the United States and the statutes of the State of Colorado, and was and is a prior, paramount, valid and subsisting lode mining claim, and a
4 prior, paramount and valid appropriation of the premises in controversy.

Fourth. The trial court erred in not rendering judgment for the appellant herein for the reason that the agreed statement of facts upon which this cause was tried shows that the findings and judgment of the trial court are against the evidence, and that such findings and judgment should have been against the appellee and in favor of this appellant.

Wherefore, this appellant prays:

That, by reason of the several errors aforesaid, the judgment aforesaid may be reversed, set aside and held for naught.

JOHN KNOWLES,
Attorney for Appellant.

Endorsed: In the supreme court of Colorado. J. A. Small, appellant, vs. F. C. Brown, appellee. Assignment of errors. Charles F. Potter, attorney and counselor, suite 301-2 Boston building, Denver, Colorado.

5 In the District Court of Teller County, Colorado.

J. A. SMALL, Plaintiff, }
 vs. } No. 128.
 F. C. BROWN, Defendant. }

6 UNITED STATES OF AMERICA.

STATE OF COLORADO, } ss:
 County of Teller, }

In the District Court.

Pleas before the Honorable Louis W. Cunningham, one of the judges of the district court of the fourth judicial district of the State of Colorado within and for the county of Teller, at a term of court thereof begun and held at the court house, in the city of Cripple Creek, county and State aforesaid, on the sixth day (it being the first Monday) of May, in the year of our Lord, one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

Present: Honorable Louis W. Cunningham, judge aforesaid; Henry Trowbridge, Esq., district attorney; James T. Stewart, Esq., sheriff of said county; A. W. Grant, clerk of said court.

Attest:

A. W. GRANT, Clerk,
 By W. E. FOLEY, Deputy.

Be it remembered, that thereafter and on to-wit, the 11th day of July, A. D. 1899, there was filed in the office of the clerk
 7 of said court a certain complaint, which is in the words and figures following, to-wit:

8 STATE OF COLORADO, } ss:
 County of Teller, }

In the District Court.

J. A. SMALL, Plaintiff, } No. —. Complaint. Adverse—P. G.
 vs. } vs. Scorpion. Survey No. 12641.
 F. C. BROWN, Defendant. }

Comes now the plaintiff above named by Gidden & McCarthy, his attorneys, and for cause of action against the defendant, alleges and shows:

I.

That on the 16th day of July, 1898, the plaintiff was, and ever since has been and now is the owner of and in actual possession and

occupation of the P. G. Lode mining claim, being 728 feet in length by 300 feet in width, situate in the Cripple Creek mining district, county of Teller and State of Colorado, except as dispossessed thereof by the said defendant, as is hereafter more fully set forth :

II.

That on the 16th day of July, 1898, the plaintiff, J. A. Small, being then and there, and ever since remaining a citizen of the United States, and over the age of twenty-one years, entered upon the vacant, unoccupied and unappropriated public mineral domain of the United States, in the Cripple Creek mining district, in that portion of the county of El Paso, now within Teller county, State of Colorado, and then and there discovered thereon a well defined vein or lode of valuable gold bearing rock, and located the same as a lode mining claim, 728 feet in length by 300 feet in width, and named and called the same the P. G. Lode mining claim." That at the time of making the said discovery the said discoverer posted at the point thereof a plain sign or notice, containing the name of the lode to-wit, The P. G. lode; the said date of its discovery, to-wit: on the 16th day of July, 1898; and the name of the discoverer, to-wit; J. A. Small. And thereafter and within sixty days from the date of said discovery the said discoverer sunk or caused to be sunk at the point of such discovery, a shaft upon said lode or vein to a depth of more than ten feet below the lowest part of the rim thereof at the surface, and did therein and at such depth uncover and disclose a well defined vein or crevice, in rock in place, bearing gold and other precious metals in appreciable quantities, and did mark and define the surface boundaries of said claim by placing six substantial posts, firmly set in the ground, one of said posts being set at each corner and one at the center of each side line of said claim, and did mark said posts on the sides in towards said claim with inscriptions denoting the respective monuments of said claim.

III.

That thereafter and within three months from the date of said discovery, and on to-wit: the 27th day of July, 1898, the said discoverer did file or caused to be filed for record, with the clerk & recorder of the county of El Paso and State of Colorado (in which county said premises were then located) a certificate of location of said claim; containing the name of the claim, to-wit; The P. G.; the name of the locator, to-wit; J. A. Small; the date of said location, to-wit; July 16th, 1898: the number of feet in length claimed along said vein on each side of the center of said discovery shaft, to-wit, 712 feet northerly and 16 feet southerly and the general course and direction of said lode, or vein, together with such a description of said claim by reference to natural objects and permanent monuments, as would serve to identify the same with reason-

able certainty, which said certificate of location now appears of record in the office of clerk & recorder of the said county of El Paso.

IV.

That said J. A. Small, the plaintiff herein, has fully and in every particular complied with the rules and regulations of miners in the Cripple Creek mining district; with the laws of the State of Colorado and of the United States of America, concerning the discovery and location of lode mining claims upon the unoccupied and unappropriated public mineral domain of the United States.

V.

That the said plaintiff is now the owner of the said P. G. Lode mining claim, and claims the legal right to occupy and possess the same by virtue of the discovery and location thereof, and a full and complete compliance with the rules, customs and usages of miners in said mining district, and by virtue of a full and complete compliance with each and every of the laws of the State of Colorado and the laws of the United States of America, concerning the discovery, location and appropriation of lode mining claims upon the public mineral domain of the United States, including the performance thereon of not less than one hundred dollars' worth of labor during each and every calendar year, and by virtue of actual prior possession thereof, as a lode mining claim, lying upon the public mineral domain of the United States.

VI.

That the defendant herein has wrongfully entered upon a certain part and parcel of said P. G. Lode mining claim, to-wit, all that part and portion thereof, which is intersected and covered by the exterior boundary lines of patent survey No. 12641, of the Scorpion Lode mining claim, as shown by the plat attached to plaintiff's adverse claim and protest against the entry by defendant of the said Scorpion Lode mining claim, which was filed in the United States land office, at Pueblo, Colorado, on the 6th day of July, 1899; and that the area so wrongfully entered upon by the defendant is described by metes and bonds, as follows, to-wit:

Beginning at corner No. 1 of the P. G. Lode mining claim, which is identical with corner No. 1 of the Scorpion Lode mining claim, patent survey No. 12641; thence N. 86 deg. 49 min. W. 310.70 — ;
thence S. 20 deg. 40 min. W. 728 feet; thence S. 86 deg. 49
12 min. E. 310.7 feet; thence N. 20 deg. 40 min. E. 728 feet to place of beginning, containing 4.885 acres more or less. That said defendant has ever since wrongfully withheld and now wrongfully withholds possession of said parcel of said P. G. Lode mining claim from the plaintiff herein to his damage in the sum of one thousand dollars.

VII.

That on the 24th day of June, 1899, the defendant herein filed in the United States land office at Pueblo, Colorado, his application for patent from the United States of America to said survey lot No. 12641, the Scorpion Lode mining claim. That the first publication of the notice of the defendant's said publication for patent was published on June 24th, 1899. That upon the 6th day of July, 1899, and within sixty days after said first publication of the notice of said application for patent, and within the period required by law, for the publication of notice of application for patent, the plaintiff filed in the United States land office at Pueblo, Colorado, his adverse claim and protest on behalf of his said P. G. Lode mining claim, against the issuance of a United States patent to the defendant herein for the said Scorpion Lode mining claim, patent survey No. 12641. That this suit is brought in support of said adverse claim and protest, and that the same is so brought within thirty days after the filing thereof.

VIII.

That the plaintiff has necessarily expended in and about the preparation and filing of the necessary maps, plats, adverse claim
13 and exhibits in the United States land office, in the matter of his said adverse claim and protest, the sum of one hundred dollars and that the sum of one hundred dollars is a reasonable attorneys' fee for the prosecution of plaintiff's said adverse claim and protest:

Wherefore, plaintiff prays judgment against the defendant:

I.

For the recovery of the possession of the above described parcel of his said P. G. Lode mining claim.

II.

For the sum of two hundred dollars for the preparation and prosecution of his said adverse claim and protest.

III.

For the sum of one thousand dollars damages.

IV.

For costs of suit and such other and further order, judgment or relief as to the court may seem just and proper.

GLIDDEN & McCARTHY,
Attorneys for Plaintiff.

Endorsed: No. 128. In the district court, Teller county. J. A. Small, plaintiff, vs. F. C. Brown, defendant. Filed in the district court of Teller county, Colorado, Jul- 11, 1899. F. E. Boynton, clerk. Adverse complaint P. G. vs. Scorpion.

14 Be it remembered, that thereafter and on to-wit: the 13th day of July, A. D. 1899, there was filed in the office of the clerk of said court a certain summons, which is in the words and figures following, to wit:

STATE OF COLORADO, }
County of Teller, } ss:

In the District Court.

J. A. SMALL, Plaintiff, }
 versus } Summons.
F. C. BROWN, Defendant. }

The People of the State of Colorado to F. C. Brown, the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff in the district court of Teller county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint, and if a copy of the complaint in the above entitled action be not served with this summons, or if the service hereof be made out of the State, then ten days additional to the
15 time hereinabove specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought by the said plaintiff to recover possession of all that portion of the P. G. Lode mining claim which is in conflict with "the Scorpion Lode mining claim, U. S. min. sur. No. 12641, situate in the Cripple Creek mining district, Teller county, Colorado, and which said plaintiff alleges to be wrongfully withheld by said defendant; for the sum of two hundred dollars expended by said plaintiff in the preparation and prosecution of his adverse claim and protest in the United States land office; for the sum of one thousand dollars damages for the wrongful withholding of said premises; for costs of suit and such other and further relief as to the court may seem just and proper; as will more fully appear from the complaint in said action to which reference is hereby made; and a copy of which is hereto attached.

And you are hereby notified that if you fail to appear and to answer the said complaint as above required, the said plaintiff will apply to the court for the relief therein demanded.

Given under my hand and the seal of said court, at Cripple Creek, in said county, this 11 day of July, A. D. 1899.

[SEAL.]

F. E. BOYNTON, Clerk,
By E. K. GAYLORD, Deputy.

STATE OF COLORADO, }
County of Teller, } ss :

I do hereby certify that I have duly served the within
16 summons, together with a copy of the complaint in the within
stated action on this 12th day of July, A. D. 1899, by delivering to and leaving with F. C. Brown, the said defendant personally in the county of Teller, a copy of the said summons together with a copy of the complaint in the action therein mentioned, thereto attached.

JAMES T. STEWART, Sheriff.

Endorsed : Original No. 128—Summons. In the district court, Teller county, J. A. Small, plaintiff, vs. F. C. Brown, defendant. State of Colorado, county of Teller, ss. Office July 12th A. D. 1899. I hereby certify that I received the within summons on this 12th day of July, 1899, at 11 o'clock a. m. James T. Stewart, sheriff, J. D. Harrigan, undersheriff. Filed in the district court of Teller county, Colorado, Jul-13, 1899. F. E. Boynton, clerk, E. K. Gaylord, deputy.

Be it remembered, that thereafter and on to-wit : the 16th day of November, A. D. 1899, there was filed in the office of the clerk of said court a certain answer, which is in the words and figures following, to-wit :

17 STATE OF COLORADO, }
County of Teller, } ss :

In the District Court.

J. A. SMALL, Plt.,	} Answer. Adverse P. G. — Scorpion, Survey No. 12641.
vs.	
F. C. BROWN, Def't.	

Comes now the defendant by McHarg and Shilling, his attorneys, and answering the complaint in the above named cause of action, denies each and every allegation contained therein.

For a second and further defense the defendant says :

I.

That on the 13th day of May, 1896, the defendant, F. C. Brown, being at that date, and ever since remaining, a citizen of the United

States, entered upon the vacant, unoccupied, and unappropriated public mineral domain of the United States, in the Cripple Creek mining district, in that portion of the county of El Paso, now within the county of Teller, State of Colorado, and then and there discovered thereon a well defined vein or lode of valuable mineral bearing rock and located the same as a lode mining claim, 728 feet in length and 300 feet in width, and named and called the same the Scorpion Lode mining claim; that at the time of making said discovery, the

discoverer F. C. Brown, defendant in the above named cause
18 of action, posted at the point thereof a plain sign or notice, containing the name of the lode, to-wit: the Scorpion, the date of discovery, to-wit: the 13th day of May, 1898, and the name of the discoverer, to-wit: F. C. Brown. And thereafter and within sixty days from the date of said discovery, the said discoverer sunk or caused to be sunk at the point of such discovery, a shaft upon such lode or vein, to the depth of more than ten feet below the lowest part of the rim thereof at the surface, and in said shaft, and at such depth, did therein disclose a well defined vein or crevice in rock in place, bearing gold and other precious metals in appreciable quantities, and did mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground one of said posts being set at each corner and one at the center of each side line of said claim, and did mark said posts on the sides in towards said claim with inscriptions denoting the respective boundaries of said claim.

II.

That thereafter and within ninety days from the date of said discovery, the said discoverer did file or cause to be filed, with the clerk and recorder of the county of El Paso (in which county said premises were then located) a certificate of location of said claim, containing the name of the claim, to-wit: the Scorpion; the name of the locator, to-wit: F. C. Brown; the date of location, to-wit: the 13th day of May, 1898; the number of feet in length claimed along
said vein on each side of the center of said discovery shaft,

19 to-wit: 712 feet, northerly and 16 feet southerly and the general course and direction of said lode, or vein, together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty, which said location certificate now appears of record in the office of clerk and recorder of said county of El Paso, State of Colorado.

III.

That said defendant now claims ownership and the right to occupy and possess said Scorpion Lode mining claim by virtue of prior discovery, location and possession and appropriation of said lode mining claim, upon the public mineral domain of the United States, including the performance thereon of not less than one hundred dollars worth of labor during each and every calendar year.

IV.

That the premises sued for in the above mentioned complaint are part and parcel of said Scorpion Lode mining claim, the property of said defendant.

McHARG AND SHILLING,
Attorneys for Defendant.

11/11/99.

Received a copy of above answer.

GLIDDEN & McCARTHY,
Pl'ff's Att'y-.

Endorsed: No. 128. In district court, Teller county. J. A. Small, plaintiff—*vs.*—F. C. Brown, defendant. Answer. Filed in the district court of Teller county, Colorado, Nov. 16, 1899. F. E. Boynton, clerk.

20 Be it remembered, that thereafter and on to wit: the 19th day of April, A. D. 1901, there was filed in the office of the clerk of said court a certain stipulation, which is in the words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Teller, }

In the District Court.

J. A. SMALL, Plaintiff, }
vs. } No. 128. Stipulation.
F. C. BROWN, Defendant. }

It is stipulated and agreed, by and between the parties hereto as between themselves, and by and between the parties hereto and the plaintiff and defendant in a certain suit, No. 219 pending in this court, in which Charles Duncan Gurney is plaintiff and F. C. Brown is defendant, that the above entitled cause and said suit of Gurney—*vs.*—Brown shall be submitted to the court on the same agreed stipulation and statement of facts for judgment upon the merits, a signed copy of which said stipulation and statement of facts, has been filed in said suit No. 219.

21

JOHN KNOWLES,
Attorneys for Plaintiff.
T. F. McCARTHY,
Attorney for Defendant.

J. C. HELM AND
JONES & BUTLER,
Attorneys for Plaintiff in Gurney *vs.* Brown.
T. F. McCARTHY,
Attorney for Defendant in Gurney *vs.* Brown.

Endorsed: 128—In district court—Teller county, Colo. J. A. Small, plaintiff, vs. F. C. Brown, defendant. Filed in the district court of Teller county, Colorado, Apr. 19, 1901. A. W. Grant, clerk, by W. E. Foley, deputy clerk.

22 Be it remembered, that thereafter and on to-wit: the 3rd day of May, A. D. 1901, there was filed in the office of the clerk of said court a certain stipulation, which is in the words and figures following, to-wit:

STATE OF COLORADO, }
County of Teller, } ss:

In the District Court.

J. A. SMALL, Plaintiff, }
vs. } No. 128. Stipulation.
F. C. BROWN, Defendant. }

It is stipulated that the above entitled cause may be set by the court for trial at any time convenient to the court.

JOHN KNOWLES,
Attorney for Plaintiff.
T. F. MCCARTHY,
Attorney for Defendant.

Endorsed: 128—In district court, Teller county, Colo. J. A. Small, plaintiff, vs. F. C. Brown, defendant. Stipulation—Filed in the district court of Teller county, Colorado, May 3, 1901. A. W. Grant, clerk, by H. P. Seeds, deputy.

23 Be it remembered, that thereafter and on to-wit: the 6th day of May, A. D. 1901, the same being one of the regular juridical days of the May A. D. 1901 term of said court, the following proceedings, *inter alia*, were had and done to-wit:

J. A. SMALL, Plaintiff, }
vs. } No. 128. Order.
F. C. BROWN, Defendant. }

At this day in open court, it is ordered, that this cause be and the same is hereby set down for trial for June 7th, A. D. 1901.

Be it remembered, that thereafter and on to-wit: the 7th day of June, A. D. 1901, the same being one of the regular juridical days of the May, 1901 term of said court, the following proceedings, *inter alia*, were had and done, to wit:

J. A. SMALL, Plaintiff,
 vs.
 F. C. BROWN, Defendant. } Order.

At this day in open court, by consent of parties, it is ordered that the trial order in this cause be and the same is hereby vacated, and said cause reset for June 12, 1901.

24 Be it remembered, that thereafter and on to-wit: the 15th day of June, A. D. 1901, the same being one of the regular juridical days of the May, A. D. 1901 term of said court, the following proceedings, *inter alia*, were had and done, to-wit:

CHARLES DUNCAN GURNEY, Plaintiff,
 vs.
 F. C. BROWN, Defendant. } No. 219. Order.

At this day in open court come said parties by their attorneys respectively.

Thereupon, by consent of the parties herein, it is ordered that cause No. 128 of the civil docket in this court be and the same is hereby consolidated with this cause for the purpose of trial.

CHARLES DUNCAN GURNEY, J. A. SMALL, Plaintiff,
 vs.
 F. C. BROWN, Defendant. } 128-219. Order.

At this day in open court come said parties by their attorneys, respectively.

25 Thereupon this cause coming on for trial before the court, a jury being expressly waived, the same is submitted to the court upon an agreed statement of facts. Thereupon come the argument of counsel which is continued until the 27th day of June, A. D. 1901.

Be it remembered, that thereafter and on to-wit: the 27th day of June, A. D. 1901, the same being one of the regular juridical days of the May, A. D. 1901 term of said court, the following proceedings *inter alia* were had and done, to-wit:

CHARLES DUNCAN GURNEY, J. A. SMALL, Plaintiff,
 vs.
 F. C. BROWN, Defendant. } 219-128. Order.

At this day in open court come said parties by their attorneys respectively. Thereupon this cause coming on to be heard upon the continued argument of the parties hereto, it is ordered that the parties continue their arguments herein by brief, and the court doth take said cause under advisement.

26

UNITED STATES OF AMERICA.

STATE OF COLORADO, } ss:
 County of Teller, }

In the District Court.

Pleas before the Honorable Louis W. Cunningham, one of the judges of the district court of the fourth judicial district of the State of Colorado, within and for the county of Teller, at a term of court thereof begun and held at the court house, in the city of Cripple Creek, county and State aforesaid, on the 9th day (it being the second Monday) of September, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-sixth.

Present: Honorable Louis W. Cunningham, judge aforesaid;
 Henry Trowbridge, Esq., district attorney; James T. Stewart, Esq.,
 sheriff of said county; A. W. Grant, Esq., clerk of said county.

Attest:

A. W. GRANT, Clerk,

By W. E. FOLEY, Deputy.

Be it remembered, that thereafter and on to-wit: the 16th day of September, A. D. 1901, the same being one of the regular juridical days of the September, A. D. 1901 term of said court, the following proceedings, *inter alia*, were had and done, to-wit:

27 J. A. SMALL, Plaintiff, }
 vs. } 128. Order.
 F. C. BROWN, Defendant. }

At this day in open court come said parties by their attorneys respectively. Thereupon this cause having been heretofore submitted to the court upon the agreed statement of facts, of the parties hereto, and the court having heard all of the arguments of counsel and having fully considered the briefs of the parties hereto, and being now sufficiently advised in the premises doth find the issues herein joined in favor of the defendant F. C. Brown, and it is ordered that a decree be entered herein in accordance with the finding of the court in this behalf, in favor of the said defendant and against the said plaintiff, and that the same be recorded in the judgment book.

To which finding and judgment of the court the plaintiff duly excepts.

Be it remembered that thereafter and on to-wit: the 16th day of September, A. D. 1901, the same being one of the regular juridical days of the September, A. D. 1901 term of said court, the following proceedings *inter alia* were had and done, to-wit:

28 STATE OF COLORADO, } ss:
County of Teller, }

In the District Court.

J. A. SMALL, Plaintiff, }
vs. } No. 128. Judgment and Decree.
F. C. BROWN, Defendant. }

On this 15th day of June, A. D. 1901, the same being the 41st day of the regular May term of said court in the year 1901, the above cause came regularly on for trial upon the merits and the plaintiff J. A. Small being present in person and by his attorney John Knowles, and the defendant F. C. Brown being present in person and by his attorney T. F. McCarthy, and both parties having announced themselves ready for trial, and a trial by jury having been expressly waived, the trial of said cause was thereupon begun at the court house, in the city of Cripple Creek, Teller county, Colorado, on said date before the Honorable Louis W. Cunningham, one of the judges of said court; and it being stipulated and agreed between the plaintiff and the defendant herein that the agreed statement of facts in writing filed in the above entitled court on April 19th, 1901, in that certain action therein pending in which Charles Duncan Gurney was plaintiff and F. C. Brown was defendant, which action is numbered 219 on the records of the clerk of said court, together
29 with each and every of the exhibits and other documentary evidence thereto attached, should be ready in evidence in this cause as and for an agreed statement of all issuable facts herein, and the court having heard read the aforesaid agreed facts herein, and the plaintiff and the defendant having each rested, the introduction of evidence herein was thereupon closed; and the further hearing of said cause was thereupon continued.

And on this 27th day of June, A. D. 1901, being the 53rd day of the regular May term of said court in the year 1901, the above cause came regularly on again for hearing in pursuance of such continuance before the Honorable Louis W. Cunningham, one of the judges of said court, at the court house, in the city of Cripple Creek, Teller county, Colorado, and the plaintiff being present in person and by his attorney, and the defendant being present in person and by his attorney, and both parties having announced themselves ready, and the court having heard the argument of the attorney for the plaintiff and the argument of the attorney for the defendant, further argument in said cause was thereupon closed, and the said cause taken under advisement by the court.

And the court being now sufficiently advised in the premises, doth find the issues herein joined for the defendant, F. C. Brown; and

Doth further find that the defendant F. C. Brown has established his right and title and is entitled to the possession and occupancy of

all the ground in controversy herein, to-wit: all of the conflict area between the "P. G." Lode mining claim, claimed by the plaintiff herein, and the Scorpion Lode mining claim, U. S. mineral survey No. 12641 owned by the defendant herein, by reason of a full compliance with all and singular the acts of Congress and the statutes of the State of Colorado, relating to the discovery, location and appropriation of lode mining claims upon the public mineral domain of the United States.

And thereupon it is ordered, adjudged and decreed, that the defendant, F. C. Brown do have and recover of and from the plaintiff, J. A. Small, all of the area and territory in conflict between the plaintiff's so-called P. G. Lode mining claim and the defendant's Scorpion Lode mining claim, U. S. mineral survey No. 12641 in the Cripple Creek mining district, Teller county, Colorado, said conflict area being more particularly described as follows, to-wit:

Beginning at cor. No. 1 of the P. G. Lode mining claim, which is identical with corner No. 1 of the Scorpion Lode mining claim, patent survey No. 12641; thence N. 86 deg. 49 min. W. 310.70 ft.; thence S. 20 deg. 40 min. W. 728 ft.; thence S. 86 deg. 49 min. E. 310.7 feet; thence N. 20 deg. 40 min. E. 728 ft., to place of beginning, containing 4.885 acres more or less.

It is further ordered, adjudged and decreed, that the defendant do have and recover of and from the plaintiff his costs in this behalf expended.

Dated this — day of — A. D. 1901.

By the court:

— — —, Judge.

Endorsed: 128. Filed in the district court of Teller county, Colorado, Sept. 16, 1901, A. W. Grant, clerk, H. P. Seeds, deputy.

31 J. A. SMALL, Plaintiff, }
vs. } 128. Order.
F. C. BROWN, Defendant. }

At this day in open court comes said plaintiff by his attorney, John Knowles, Esq., and prays an appeal herein to the supreme court of the State of Colorado, which is allowed upon condition that plaintiff give within twenty days from this date a good and sufficient bond in the penal sum of two hundred and fifty dollars, with surety or sureties to be approved by the clerk of this court; and

It is ordered that time and until sixty days from this date be and the same is hereby allowed plaintiff within which to prepare and tender to the Honorable Louis W. Cunningham, one of the judges of this district court, his bill of exceptions by him reserved herein, and when signed and sealed by said judge, shall be filed herein as of this day.

Be it remembered, that thereafter and on to-wit: the 10th day of October, A. D. 1901, there was filed in the office of the clerk of said court a certain appeal bond, which is in the words and figures following, to-wit:

32 Know all men by these presents, that we, J. A. Small, H. E. Woods and F. M. Woods, of the county of Teller, and State of Colorado, are held and firmly bound unto F. C. Brown, in the penal sum of two hundred and fifty and no / 100 dollars, lawful money of the United States, for the payment of which well and truly to be made, we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated at — this — day of — in the year of our Lord one thousand nine hundred and one.

The condition of the above obligation is such, that whereas, the said F. C. Brown, did, on the 18th day of September, one thousand nine hundred and one, at a term of the district court then being holden within and for the fourth judicial district in the county of Teller and State of Colorado, obtain a judgment against the above bounden J. A. Small for possession and occupancy of all the ground in controversy in said action to-wit: all the conflict area between the P. G. Lode mining claim, claimed by said J. A. Small, and the Scorpion Lode claim, claimed by said F. C. Brown, and costs of suit from which the said J. A. Small has prayed for and obtained an appeal to the supreme court of said State of Colorado.

Now of the said J. A. Small shall duly prosecute said appeal and shall moreover pay the amount of the said judgment, costs, interest and damages rendered and to be rendered against him, the said

33 J. A. Small, in case the said judgment shall be affirmed in the said supreme court, or said appeal be dismissed for any reason, then the above obligation to be null and void; otherwise to remain in full force and virtue.

J. A. SMALL. [SEAL.]
H. E. WOODS. [SEAL.]
F. M. WOODS. [SEAL.]

STATE OF COLORADO, }
Teller County. }

Personally appeared before me this day Charles del Bondio, a notary public of Teller county, Colorado, H. E. Woods, of the county and State aforesaid, one of the securities on the bond of J. A. Small, who being duly sworn deposes and says: That he is seized and possessed in his own right, over and above all his just debts and liabilities in property not exempt by law from levy and sale under execution of a clear, unincumbered estate of the value of one thousand dollars, within the jurisdiction of this State.

H. E. WOODS.

Subscribed and sworn to before me, this 28th day of September,
A. D. 1901.

My commission expires April 29th, 1903.

CHARLES DEL BONDIO,
Notary Public.

[SEAL]

34 STATE OF COLORADO, {
Teller County. }

Personally appeared before me Charles del Bondio, a notary public of Teller county, Colorado, F. M. Woods, of the county and State aforesaid, one of the securities on the bond of J. A. Small, who, being duly sworn, deposes and says that he is seized and possessed in his own right over and above all his just debts and liabilities in property not exempt by law from levy and sale under execution of a clear, unincumbered estate of the value of one thousand dollars, within the jurisdiction of this State.

F. M. WOODS.

Subscribed and sworn to before me, this 28 day of September,
A. D. 1901.

My commission expires April 29th, 1903.

CHARLES DEL BONDIO,
Notary Public.

[SEAL]

Endorsed: No. 128. Appeal bond to supreme court. Approved and filed in the district court of Teller county, Colorado, Oct. 4, 1901.
A. W. Grant, clerk, by W. E. Foley, deputy.

35 STATE OF COLORADO, {
County of Teller, } ss:

In the District Court.

I, A. W. Grant, clerk of the district court of the fourth judicial district of the State of Colorado, within and for the county of Teller, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain complaint, summons, answer, stipulations, judgment and decree, appeal bond, and all orders of court, had and entered of record in a certain cause in said district court lately pending, wherein J. A. Small was plaintiff, and F. C. Brown was defendant, as the same appear of record and on file in my office remaining.

I do further certify, that the attached bill of exceptions is the original bill of exceptions filed in my office on the 21st day of December, A. D. 1901.

In witness whereof, I have hereunto placed my hand and affixed the seal of said court at my office in the city of Cripple
[SEAL.] Creek, county and State aforesaid, this 21st day of December, A. D. 1901.

A. W. GRANT, Clerk.

Pl'ff's costs \$16.50.

Def't's costs, \$2.85.

18 JOSIAH APPLETON SMALL VS. FRANK COLE BROWN AND

36 STATE OF COLORADO, } ss:
County of Teller, }

In the District Court of the Fourth Judicial District.

J. A. SMALL, Plaintiff, }
vs. } No. 128.
F. C. BROWN, Defendant. }

Plaintiff's Bill of Exceptions.

Be it remembered that this cause coming on for trial before the Honorable Louis W. Cunningham, one of the judges of the district court of the fourth judicial district of the State of Colorado, at the May, A. D. 1901 term of said court, on, to-wit: the 15th day of June, A. D. 1901, without the intervention of a jury, a jury by consent of the parties hereto being hereby expressly waived, said cause is submitted to the court upon the following agreed statement of facts and exhibits offered in connection therewith:

37 STATE OF COLORADO, } ss:
County of Teller, }

In the District Court.

CHARLES DUNCAN GURNEY, Plaintiff, }
vs. } No. 219. Stipulation.
F. C. BROWN, Defendant. }

It is hereby stipulated and agreed, that for the purpose of the trial of this case, the following facts are true, and they may be considered as having been established by competent evidence. It is further stipulated that this case shall be submitted to the court, a jury being hereby expressly waived, on the following statement of facts, to-wit:

1. That on the 28th day of May, 1895, the Commissioner of the General Land Office rendered a decision, of which a certified copy is hereto attached and marked "Exhibit A."

2. That on the 16th day of September, 1895, the Commissioner of the General Land Office rendered a decision, a copy of which is hereunto annexed and marked "Exhibit B."

3. That on the 8th day of January, 1896, the Commissioner of the General Land Office rendered a decision, of which a certified copy is hereunto annexed and marked "Exhibit C."

38 4. That on the 5th day of February, 1896, the Commissioner of the General Land Office rendered a decision, of which a certified copy is hereunto annexed, and marked "Exhibit D."

5. That on the 7th day of April, 1896, the acting Secretary of the Interior (John M. Reynolds) rendered a decision of which a certified copy is hereunto annexed and marked "Exhibit E."

6. That on the 22nd day of October, 1897, the Commissioner of the General Land Office rendered a decision of which a copy is hereunto annexed, and marked "Exhibit F."

7. That on the 7th day of May, 1898, the Secretary of the Interior (C. N. Bliss) rendered a decision, of which a certified copy is hereunto annexed and marked "Exhibit G."

8. That on the 13th day of May, 1898, defendant, being at that date and ever since remaining a citizen of the United States, and over the age of 21 years, entered upon the land in question, hereinafter particularly described, and then and there discovered thereon a well-defined vein or lode of valuable mineral-bearing rock, and located the same as a lode mining claim, 728 feet in length, and 300 feet in width, and called and named the same the Scorpion Lode mining claim.

9. That at the time of the said discovery the defendant posted at the point thereof a plain sign or notice, containing the name of the lode, to-wit: the Scorpion; the date of discovery, to-wit: the 13th day of May, 1898; the name of the discoverer, to-wit: F. C. Brown; and thereafter, and within 60 days from the date of said discovery, the said defendant sunk or caused to be sunk at the point of such discovery a discovery shaft upon such lode or vein to a depth of more than ten feet below the lowest part of the rim thereof at the surface; and in such shaft and at such depth discovered and disclosed a well-defined vein or crevice of rock in place bearing
39 gold, silver and other precious metals in appreciable quantities, and said defendant did then and there mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground, one at each corner and one at the center of each side line of said claim; and did then and there mark said posts on the sides in towards the claim with the inscription denoting the respective corners of said claim.

10. That thereafter and within three months from the date of such discovery the defendant did file or cause to be filed with the clerk and recorder of the county of El Paso, in which said county said premises were on such date located, a certificate of location of such claim, containing the name of the claim, to-wit: the Scorpion; the name of the locator, to-wit: F. C. Brown; the date of location, to-wit: the 13th day of May, 1898; the number of feet in length claimed along the vein on each side of the center of said discovery shaft, to-wit: 712 feet northerly and 16 feet southerly; and the general course and direction of said vein or lode, together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty; which said location certificate now appears of record in the office of the clerk and recorder of said county of El Paso and State of Colorado.

11. That on the 15th day of July, A. D. 1898, the defendant F. C. Brown, made an amended location of said lode claim, and on said date made an amended location certificate thereof, containing the name of the claim, to-wit: the Scorpion; the name of the locator, to-wit: F. C. Brown, the date of the amended location, to-wit: July 15th, 1898; the number of feet in length claimed along the vein, to-wit: 693 feet running north $20^{\circ} 40'$ east and 25 feet running south $20^{\circ} 40'$ west from the discovery shaft thereon, and surface ground 300 feet in width; together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the claim with reasonable certainty; which said location certificate was, on said 15th day of July, A. D. 1898, filed for record and recorded in Book 6, page 48, in the office of the clerk and recorder of said county of El Paso and State of Colorado.

12. That on the 16th day of July, A. D. 1898, the defendant, F. C. Brown made an amended location of said lode claim, and on said date made an amended location certificate thereof, containing the name of the claim, to-wit: the Scorpion; the name of the locator, to-wit, F. C. Brown; the date of amended location, to-wit: July 16th, 1898; the number of feet in length claimed along the vein to-wit: 693 feet running north $20^{\circ} 40'$ east and 25 feet running south $20^{\circ} 40'$ west from the discovery shaft thereon, and surface ground 300 feet in width; together with such a description of said claim, with reference to natural objects and permanent monuments as would serve to identify the claim with reasonable certainty; which said location certificate was, on said 16th day of July, A. D. 1898, filed for record and recorded in Book 6, page 49, in the office of the clerk and recorder of said county of El Paso, and State of Colorado.

13. That the defendant has fully and completely complied with each and every of the laws of the State of Colorado and of the United States, governing the discovery and location of lode mining claims within the Cripple Creek mining district aforesaid; provided, however, that it is not admitted that at the time of said locations the ground embraced in said location was a part of the vacant and unappropriated public domain; and further, it is admitted that during each and every calendar year since the said discovery and location of the Scorpion claim not less than one hundred dollars' worth of work and labor and improvements have been done and made by defendant, in respect of and to hold such claim.

14. That on the 14th day of June, 1898, the Cripple Creek Gold Mining Company, by its president, filed in the General Land Office an instrument dated June 10th, 1898, of which a copy is hereunto annexed and marked "Exhibit H."

15. That on the 23rd day of June, 1898, the plaintiff had declared his intention to become a citizen of the United States before a court of record, to wit: the superior court of the county of Los Angeles, in the State of California.

16. That on the said 23rd day of June, 1898, the plaintiff, who was over the age of twenty-one years, entered upon the land in question

hereinafter particularly described, and then and there discovered thereon a well defined vein or lode of valuable mineral bearing rock, and located the same as a lode mining claim 713.7 feet in length, and 300 feet in width, and called and named the same the Hobson's Choice Lode mining claim.

17. That at the time of the said discovery the plaintiff posted at the point thereof a plain sign or notice containing the name of the lode, to-wit: the Hobson's Choice; the date of discovery, to-wit: the 23rd day of June, 1898; the name of the discoverer, to-wit: Charles Duncan Gurney; and thereafter and within sixty days from the date of said discovery the said plaintiff sunk or caused to be sunk at the point of such discovery a discovery shaft upon such lode or vein to a depth of more than ten feet below the lowest part of the rim thereof at the surface, and in such shaft and at such depth discovered and disclosed a well-defined vein or crevice of rock in place bearing gold, silver and other precious metals in appreciable quantities, and said plaintiff did then and there mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground one at each corner and one at the center of each side line of said claim; and did then and there mark said posts on the sides in toward the claim with the inscription denoting the respective corners of said claim.

18. That thereafter and within three months from the date of such discovery the plaintiff did file or cause to be filed with the clerk and recorder of the county of El Paso, in which said county said premises were on such date located, a certificate of location of such claim, containing the name of the claim, to-wit the Hobson's Choice, the name of the locator, to-wit: Charles Duncan Gurney; the date of location, to-wit: the 23rd day of June, 1898; the number of feet in length claimed along the vein on each side of the center of said discovery shaft, to-wit: 633.7 feet northerly, and 80 feet southerly, and the general course and direction of said vein or lode together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty; which said location certificate now appears of record in the office of the clerk and recorder of said county of El Paso and State of Colorado.

19. That the plaintiff has fully and completely complied with each and every of the laws of the State of Colorado, and of the United States governing the discovery and location of lode mining claims, within the Cripple Creek mining district aforesaid with reference to the said Hobson's Choice Lode claim; provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain. And further it is admitted that during each and every calendar year since the said discovery and location of the Hobson's Choice claim not less than one hundred dollars' worth of work and labor and improvements have been done and made by plaintiffs in respect of and to hold such claim.

20. That on the 15th day of July, A. D. 1898, the Commissioner of the General Land Office rendered a decision and made an order of which a certified copy is hereto attached and marked "Exhibit K."

21. That on the 16th day of July, 1898, one J. A. Small was, and ever since has been, a citizen of the United States and over the age of twenty-one years, and that on the said date, to-wit: the 16th day of July, 1898, the said J. A. Small entered upon the land in question hereinafter particularly described, and then and there discovered thereon a well defined vein or lode of valuable mineral bearing rock, and located the same as a mining claim 728 feet in length by 300 feet in width, and called and named the same the "P. and G." Lode mining claim.

22. That — the time of said discovery the said J. A. Small posted at the point thereof a plain sign or notice containing the name of the lode, to-wit: the "P. and G.;" the date of discovery, to-wit: July 16th, 1898; and the name of the discoverer, to-wit: J. A. Small; and thereafter and within sixty days from the date of said discovery the said J. A. Small sunk or caused to be sunk at the point of such discovery a discovery shaft upon such lode or vein to a depth of more than ten feet below the lowest part of the rim thereof at the surface, and in such shaft and at such depth discovered and disclosed a well defined vein or crevice of rock in place bearing gold, silver and other precious metals in appreciable quantities; and said J. A. Small did then and there mark and define the surface boundaries of said claim by placing six substantial posts firmly set in the ground, one at each corner and one at the center of each side line of said claim; and did then and there mark said posts on the sides in toward the claim with the inscription denoting the respective corners of said claim.

23. That thereafter and within three months from the date of such discovery the plaintiff did file or cause to be filed with the clerk and recorder of the county of El Paso, in which said county said premises were on such date located, a certificate of location of said claim, containing the name of the claim, to-wit: the "P. and G.;" the name of the locator, to-wit: J. A. Small; the date of location, to-wit: July 16th 1898; the number of feet in length claimed along the vein on each side of the center of said discovery shaft, to-wit: 712 feet northerly and 16 feet southerly, and the general course and direction of said vein or lode; together with such a description of said claim with reference to natural objects and permanent monuments as would serve to identify the same with reasonable certainty; which said location certificate now appears of record in the office of the clerk and recorder of said county of El Paso and State of Colorado.

24. That the said J. A. Small has fully and completely complied with each and every of the laws of the State of Colorado and of the United States governing the discovery and location of lode mining claims within the Cripple Creek mining district aforesaid with refer-

ence to the said "P. and G." Lode claim; provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain. And further it is admitted that during each and every calendar year since the said discovery and location of the said "P. and G." Lode claim not less than one hundred dollars' worth of work and labor and improvements have been done and made by the said J. A. Small in respect of and to hold said claim.

25. That on the 27th day of April, 1899, the Commissioner of the General Land Office rendered a decision of which a copy is hereunto annexed and marked "Exhibit I."

26. That on the 19th day of June, 1899, the defendant made application to the United States land office, at Pueblo, Colorado, 46 for a patent for said Scorpion Lode claim as described in the plat and field notes on file in that office as survey No. 12641, and published his said application in a weekly newspaper published in the said county of Teller, and known as the Weekly Tribune, the first publication appearing in the issue of the said newspaper of the 24th day of June, 1899. That the plaintiff, on behalf of said Hobson's Choice Lode mining claim, during the period of such publication, and to-wit: on the 17th day of August, 1899, filed his protest and adverse claim against the entry by the defendant of the Scorpion Lode claim for patent, and within thirty days from the filing of said adverse claim commenced the present proceedings in support of his said adverse claim; and that the said J. A. Small, on behalf of the said "P. and G." Lode mining claim, during the period of such publication, and to-wit: on the 6th day of July, 1899, filed his protest and adverse claim against the entry by the defendant of the said Scorpion Lode claim for patent, and within thirty days from the filing of said adverse claim commenced a suit in support of said adverse claim in the district court of the county of Teller, in which said suit the said J. A. Small was plaintiff, and the said F. C. Brown was defendant, which said suit was numbered 128 in the register of suits for said Teller county.

27. That on the 31st day of July, 1899, the Commissioner of the General Land Office rendered a decision, of which a copy is hereunto annexed and marked "Exhibit J."

28th. That all such proceedings in the United States land office as are recited in the exhibits hereunto annexed to have taken 47 place are to be deemed as having taken place at the dates mentioned in said exhibits.

29. That the descriptions of the said Scorpion, Hobson's Choice and "P. and G." Lode claims, and the areas in conflict are the same given in the pleadings in this action, and the pleadings in the said action of J. A. Small vs. F. C. Brown are correct.

J. C. HELM AND
JONES AND BUTLER,
Attorneys for Plaintiff.
T. F. MCCARTHY,
Attorney for Defendant.

EXHIBIT A.

N. DEPARTMENT OF THE INTERIOR, G. F. P.
 L. M. W. GENERAL LAND OFFICE, J. E. W.
 WASHINGTON, D. C. May 28, 1895.

Address only the Commissioner of the General Land Office.

Register and receiver, Pueblo, Colorado.

SIRS: In case of mineral entry No. 573, made March 6, 1895, by the Cripple Creek Gold Mining Company upon the Kohnyo and Fortuna lodes, the approved survey shows that the lode line of said Kohnyo claim intersects the Mt. Rosa placer claim survey No. 7407, and extends within its boundaries for the distance of about 350 feet.

Said placer claim is excluded from this entry, and, as shown by the records of this office, was patented April 24, 1893.

By said above intersection the Kohnyo lode is divided into two non-contiguous tracts; the tracts lying north of said placer claim extending about 500 feet in length along the lode line and containing the discovery shaft and improvements, while the tract on the southerly end of claim extends for a distance of about 700 feet.

Under departmental decision dated February 23, 1893, in 49 case of the Silver Queen lode, a lode claim intersected by a prior placer location cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D., 186.

The right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

The claimant-company may, however, elect which of said tracts it desires to retain, the 500 feet on the north or the southerly 700 feet. If the latter tract is retained, evidence of discovery of mineral thereon, and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days in which to furnish required evidence or to appeal, in default of which the entry will be cancelled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice.

Should this decision become final, an amended survey will be required, establishing the southerly end line of the claim at the point where the lode intersects the placer claim.

Notify all known parties in interest hereof, in accordance with circular of October 28, 1886.

Very respectfully,

S. W. LAMOREUX,
 Commissioner.

U. S. LAND OFFICE, }
 Pueblo, Colorado, }

I hereby certify that the foregoing has been compared with the original and found to be a true and correct copy.

J. R. GORDON, Register.

50

EXHIBIT B.

N. DEPARTMENT OF THE INTERIOR, W. O. C.
 L. M. W. GENERAL LAND OFFICE, J. E. W.
 WASHINGTON, D. C., September 16, 1895.

Address only the Commissioner of the General Land Office.

Register and receiver, Pueblo, Colorado.

SIRS: By letter N. of May 28, 1895, mineral entry No. 573 made March 6, 1895 by the Cripple Creek Gold Mining Company upon the Kohnyo and Fortuna lodes was held for cancellation as to that portion of said Kohnyo claim lying south of the patented Mt. Rosa placer claim, which divides the lode into two non-contiguous portions, and is excluded from the published notice of application for patent and from entry for said lode.

I am now in receipt of your letter dated August 14, 1895, transmitting a petition of the Cripple Creek Gold Mining Company, through W. H. Leonard, agent, asking that it be allowed to make application for patent for the area in conflict between the Kohnyo lode and Mt. Rosa placer after inquiry has been made as to the existence of said vein according to the rules and regulations of the General Land Office, under the South Star decision, 20 L. D. 204.

It is set forth in said petition that said Kohnyo lode was located in October, 1891, and that said claim contains a vein or fissure of gold bearing rock with well defined walls extending throughout said claim from one end line to the other; that said vein has been opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim conflicting with said lode claim extending throughout said placer for a distance of about 350 feet; that application for patent for said placer claim was made August, 8, 1892, after the discovery and location of said Kohnyo lode; that said vein was at the time of the application for the placer "claimed and known to exist;" that it was then and is now a valid subsisting lode of great value; that by the terms of the patent granted for the Mt. Rosa placer said vein of quartz was expressly excepted and excluded from the ground; that the locators of said lode and their grantees have at all times since the location thereof, held, maintained, worked and possessed the said vein and said petitioner is now in possession thereof; and under the ruling of the South Star decision an application for patent can be made by petitioner in favor of the Kohnyo lode for said vein,

and that patent may issue to the lode owner when it has been ascertained by inquiry instituted by the department that said lode was known to exist at date of placer application. The allegations contained in said petition are corroborated by the affidavits of several witnesses.

The record shows that the Kohnyo lode was located October 2, 1891, prior to the application for the Mt. Rosa placer, filed August 5, 1892, upon which entry was made and patent issued April 24, 1893.

52 In the South Star decision, to which reference is made, it was held that when it is ascertained by inquiry instituted by the department, or determined by a court of competent jurisdiction, that a lode claim exists within the boundaries of the land covered by a placer patent, and that such lode claim was known to exist at the date of the application for such patent, and was not applied for, the land embraced in said lode is reserved from the operation of the conveyance by the terms thereof, and patent may issue for such lode if the law has been in other respects fully complied with.

The case under consideration is in its essential features analogous to the case of the South Star lode, and the decision above quoted is therefore applicable.

Although the claimant for the Kohnyo lode excluded the ground in conflict with the patented Mt. Rosa placer claim, said lode if known to exist at the date of the placer application, under the terms of exception of the placer patent did not pass to the placer patentee, but the title to the same remains in the United States in trust for the lode claimant, if said claimant as is alleged, remained in possession of said lode.

The question now to be determined is whether the lode was known to exist within the boundaries of the patented placer claim at the date of filing the placer application.

In view of the above you are hereby directed to notify claimants for the Kohnyo lode that they will be allowed thirty days in which to apply for an order for a hearing to be by them served in accordance with the rules of practice, at which to determine:

I. Whether the said Kohnyo location contains a valuable lode of vein of mineral bearing quartz, within the Mt. Rosa placer limits.

53 II. Whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim.

You will conduct the hearing in accordance with the rules of practice, and at the proper time transmit the record and evidence to this office, with your joint opinion thereon.

You will also advise the claimants for the entry that in the event of failure to apply for an order for a hearing within the period allowed of thirty days, my decision of May 28, 1895, will become final and the entry canceled in part.

Very respectfully,

S. W. LAMEREUX,
Commissioner.

a/7

U. S. LAND OFFICE, {
Pueblo, Colorado, } ss:

I, J. R. Gordon, hereby certify that the foregoing has been compared with the original and found to be a true and correct copy.

J. R. GORDON, Register.

June 11, 1900.

54

EXHIBIT C.

C. C. H.

DEPARTMENT OF THE INTERIOR,

N. GENERAL LAND OFFICE, J. V. W.
C. H. M. WASHINGTON, D. C., January 8, 1898. J. E. W.

In re Mineral Entry No. 573 upon the Kohnyo and Fortuna Lodes.
On Review.

Register and receiver, Pueblo, Colorado.

SIRS: It appears from the record in the above entitled matter that "The Cripple Creek Gold Mining Company," a corporation, filed in your office its application for patent for the Kohnyo and Fortune lodes on March 7, 1894.

Publication of notice was had, first insertion April 22, 1894, and last insertion June 24, 1894. No adverse claim being filed, you allowed applicant to make mineral entry for said two lodes on March 6, 1895.

Said Kohnyo lode was located October 2, 1891, certificate recorded December 29, 1891, and said location was surveyed October 31, 1893. Said Kohnyo lode is in conflict with the Mt. Rosa placer, and the conflict was excluded in the application for patent, the notice published, and the final certificate when issued. The exclusion of said conflict had the effect to divide said Kohnyo lode into two separate non contiguous parts, on which account said mineral entry No. 573 was, by office letter dated May 28, 1895, held for cancellation as to one of the two parts, to-wit: All that part of the Kohnyo location lying south of said Mt. Rosa placer. It appears that said Mt. Rosa placer was located on September 19, 1891, notice recorded on September 29, 1891, and said location was surveyed on May 21, 1892. It further appears that application for patent No. 291, for said Mt. Rosa placer was filed August 5, 1892, mineral entry No. 259, including said Mt. Rosa placer was made on November 7, 1892, and that patent duly issued thereon including the conflict with the Kohnyo lode, dated April 24, 1893.

In said mineral application No. 291 the Kohnyo lode is not claimed, nor is any mention made of said lode.

By your letter of August 14, 1895, you transmitted the petition of entryman in said mineral entry No. 573, for a modification of

said office decision of May 28, 1895, that said entryman be allowed a hearing at which to offer evidence for the purpose of showing that at date when said application for patent No. 291 for said Mt. Rosa placer was filed, said Kohnyo location was known to contain a valuable lode, and that in the event said entryman should satisfactorily establish the fact that said lode was valuable, and was known to be so valuable at date when application for said Mt. Rosa placer was filed, that in such case said entryman might be allowed to file a supplemental application and purchase the ground in said conflict. In support of said petition it was alleged in an affidavit made by the duly authorized agent of entryman "that said claim contains a vein or fissure of gold bearing rock with well defined walls extending throughout said claim from one end line to the other; that said vein has been

56 opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim, survey No. 7407, conflicting with said lode claim, and extends throughout the said placer for a distance of about 350 feet; that said application for patent for the said placer claim was made August 8, 1892, in the U. S. land office at Pueblo, after the discovery and location of said Kohnyo vein or lode; that said vein was at the time of the application of the aforesaid placer claim, claimed and known to exist, and it was then, and is now a valid, subsisting lode of great value" * * * that the locators of said lode and their grantees have at all times since the location thereof, held, maintained, worked and possessed the said vein, and your petitioner is now in possession thereof." * * *

Said affidavit was in substance corroborated by three other several affidavits, two of which were made by the original locators of the said Kohnyo lode. By office letter dated September 16, 1895, said decision of May 28, 1895, was modified, and you were directed to allow the petitioner a hearing. From said letter of September 16, 1895, I quote:

"Although the claimant for the Kohnyo lode excluded the ground in conflict with the patented Mt. Rosa placer claim, said lode, if known to exist at the date of the placer application, under the terms of exception of the placer patent, did not pass to the placer patentee, but the title to the same remains in the United States, in trust for the lode claimant, if said claimant, as is alleged, remained in possession of the lode. The question now to be determined is whether the lode

57 was known to exist within the boundaries of the patented placer at the date of filing the placer application. In view of the above you are hereby directed to notify claimants for the Kohnyo lode they will be allowed thirty days in which to apply for an order for a hearing to be by them served in accordance with the rules of practice at which to determine:

"I. Whether the said Kohnyo location contains a valuable lode or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

"II. Whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim."

On December 9, 1893, resident counsel for John McConaghy, claiming to be the assignee of entryman and patentee for the said Mt. Rosa placer, filed a motion for review of said office decision of September 16, 1895, and a revocation of the order for a hearing in said decision contained.

In support of said motion the following specification of errors is on file.

I. Error in giving weight or consideration to the petition of the Kohnyo claimant for a hearing in view of the fact that the motion or petition was not served upon the placer claimant (claimant of record) or its assigns, and also in view of the fact that the lode claimant by the exclusion of the ground in conflict with the placer claim, admitted that its lode did not extend into the conflicting ground.

II. Error in not taking cognizance of the fact that no cause of action is disclosed by the petition, it being nowhere alleged that said Kohnyo lode was at date of placer application known to exist within said placer conflict.

58 II. Counsel in is error as to the allegations in the petition as in my judgment the petition alleged facts sufficient to make a *prima facie* case. As conclusively disposing of the second exception of counsel I quote from the sworn petition.

* * * "That application for patent for the said placer claim was made August 8, 1892, in the U. S. land office at Pueblo after the discovery and location of said Kohnyo vein or lode; that said vein was at the time of the application of the aforesaid placer claim, claimed and known to exist, and it was then and is now a valid subsisting lode of great value." * * *

It is elsewhere alleged in said petition that said "claim contains a vein or fissure of gold bearing rock with well defined walls extending throughout said claim from one end line to the other; that said vein has been opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim, survey 7307, conflicting with said lode claim." * * *

The allegations in the petition are held to be sufficient and the second exception is not well taken.

III. From the third exception, taken in connection with the latter part of the first, I understand the position of counsel to be that the exclusion of the ground in conflict in the application for patent filed by petitioner must be construed as an admission by petitioner that this lode does not enter nor pass through said excluded ground, and that because of such exclusion he is estopped from showing or alleging as a matter of fact that the lode does pass through said ground in conflict. The act of petitioner in excluding from its application the ground in conflict is not necessarily an admission on its part that the Kohnyo lode does not pass through the

ground in conflict, and consequently the doctrine of estoppel does not apply. The fact that the exclusion was made was an intimation to the department that at the time petitioner was not asking for a U. S. patent to cover the excluded ground, but it constitutes no binding admission or intimation as to the character of the ground excluded. Moreover, it must be remembered:

1. That at the time when the petitioner filed application for the lode claim, the placer had been patented for almost a year.

2. As the law was then construed by the department the issuance of patent, however erroneously, terminated the jurisdiction of the department over the lands patented, 17 L. D. 280 and 10 L. D. 200.

3. Petitioner therefore would have been unable to get an application of record had it not excluded the ground included in the patented placer so long as the placer patent remained outstanding.

Desiring, as it did, to make entry under the then practice, it was compelled to exclude the patented ground, whatever its character might be, and in my judgment this is the fair and logical explanation of the conduct of petitioner in the premises.

I cannot therefore agree with counsel that petitioner is estopped from alleging and showing such facts as will have the effect to demonstrate that the placer patent is, and always was, invalid to the extent of the Kohuyo Lode claim.

60 IV. In the fourth exception counsel erroneously intimates that this office has decided that the petitioner is in possession of the excluded patented ground. This office has not attempted to decide that point. The question of possession is a question of fact, and one that must be established by proof, and unless the petitioner can show possession, and the right of possession, he cannot obtain a patent covering the ground. But up to the present time this office has not decided this point nor attempted to do so. But counsel further insists that the act of excluding from the application the conflict with said patented placer is tantamount to an abandonment of the excluded ground, citing the Adams decision, 16 L. D., 233.

The doctrine announced in the decision cited must be construed to apply to cases like the one then under consideration. In that case entry No. 201 had been made for the Sunday *et al.* lodes, excluding the conflict of 1,482 acres in conflict between the Sunday lode and the Adams lode.

Subsequently entry No. 413 for the Adams *et al.* lodes was made, including the ground in conflict between said Adams lode and the Sunday lode.

III. Error in not giving due weight in this case to the doctrine of estoppel not only of record but *in pais*.

IV. Error in holding that the *possession* of said conflict has remained in the lode claimants, when, under the rulings of the Secretary in the Adams Lode case, 16 L. D., 233, the lode claimant has *expressly* waived and relinquished all right, title, claim and interest in and to said conflict.

61 I. In my judgment there is no rule of practice applicable to the case at bar, which requires that notice of the petition should have been served upon the placer patentee, or his assignees. This class of contests is novel in departmental practice, originating, as it does, as the result of the doctrine announced in the *South Star* decision, 20 L. D., 204.

As the law was construed by the department prior to the said *South Star* decision, the only relief for a lode claimant in a case like the one under consideration, was to cause a suit to be instituted to vacate the placer patent to the extent of the lode, and therefore the department was frequently petitioned to recommend to the Department of Justice that a suit to vacate the placer patent be instituted. In those cases it was not the practice to serve the entryman of record with notice of the petition, but at the hearing or inquest which it was the practice to order with a view to determining whether or not it was expedient to grant the prayer of the petition and recommend the suit, the patentee was always notified and allowed to submit evidence and argument if he chose to do so.

As this office construed the *South Star* decision, a lode claimant has the option of showing in another way a state of facts which by the terms of the placer patent, renders the same invalid to the extent of any lode contained within the exterior lines of said placer, and reasoning from analogy the practice should be the same. It is therefore held that service of notice of the petition upon the patentee

62 was not required but that the ends of justice will be fully met if legal service of the notice of *hearing* is had upon the present owner of record. But counsel in the first exception further insists that the exclusion of said conflict is an admission that the lode did not extend into the conflicting ground. This proposition will be considered in connection with the third exception.

By office letter of February 27, 1892, it was decided that entryman for the Adams lode could not have patent for the ground in conflict, and said entry No. 413 was held for cancellation to that extent, and entryman for the Sunday lode was required to amend his application to purchase by striking out the clause which excluded the conflict, and to pay ten dollars additional as purchase money and make entry to include the ground in conflict.

The departmental decision cited by counsel reversed said decision, and in effect held that the Sunday applicant need not purchase or take patent for the ground in conflict if he did not wish to do so, and that inasmuch as said conflict had been excluded by the applicant for the Sunday lode, it was subject to the application for patent for the Adams lode. An entirely different state of facts obtains in the case at bar, and hence the language used in said departmental decision is not applicable.

If the allegations of the petition herein are true, as stated in my letter of September 16, 1895, the placer patent did not operate to convey to the placer patentee the title to the Kohnyo lode, but the same

is still vested in the United States in trust for the lode claimants, if they can show compliance with law.

In any event, the title to the Kohnyo lode did not pass with the placer patent, if said lode was known at date of the placer
63 application, so that in my judgment the owner of the placer is in no position to object to the order for a hearing.

The motion for review is hereby denied, and the order for a hearing will stand as the decision of this office.

Notify the parties in interest.

Very respectfully,

S. W. LAMEREUX,
Commissioner.

(B-4)

(Here follows diagram marked p. 64.)

No. 98 & 99 }
Small }
Brown

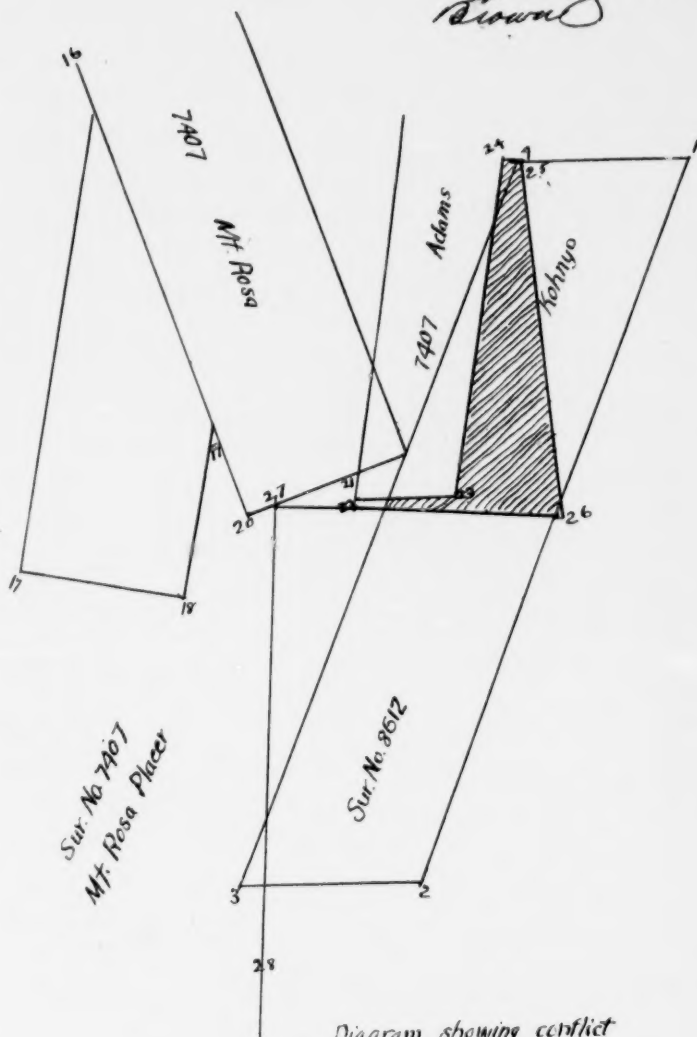


Diagram showing conflict
between Kohayo lode and
Mount Rosa Placer in Cripple
Creek Mining District,
El Paso County, Colorado.

Scale, 200 feet to an inch.



65

EXHIBIT D.

C. C. H. DEPARTMENT OF THE INTERIOR, J. V. W.
 N. GENERAL LAND OFFICE, J. E. W.
 L. M. W. WASHINGTON, D. C., February 5, 1896.

Address only the Commissioner of the General Land Office.

In re Mineral Entry No. 573, Pueblo, Colorado. The Cripple Creek Gold Mining Company. Kohnyo and Fortuna Lodes.

Register and receiver, Pueblo, Colorado.

SIRS: In the above entitled matter the record of survey shows that the Kohnyo lode is crossed by the patented Mt. Rosa placer claim which divides the lode into two non-contiguous portions.

Said conflict was excluded in claimant's application for patent, as published and in the final certificate of entry.

By office letter N. of May 8, 1895, the entry was held for cancellation as to that portion of the Kohnyo claim lying south of the patented Mt. Rosa placer.

With your letter of August 14, 1895, you transmitted to this office a petition of the Cripple Creek Gold Mining Company, asking that a hearing be allowed for the purpose of showing that at the date of filing application for patent for the Mt. Rosa placer claim the

66 Kohnyo location was known to contain a valuable lode, and that in the event that said fact should be established by claimant at said hearing, a supplemental application and purchase of the ground involved might be allowed to be made.

In support of said petition several affidavits were filed alleging the existence of a well defined vein or fissure of gold bearing rock extending throughout said claim from one end to the other, passing through the conflicting Mt. Rosa placer, where it was known to exist at the date of said placer application; also stating that said lode has been from the date of its location in the continuous possession of claimant, and has been worked and developed by claimant up to present date.

By letter N. of September 16, 1895, claimant's petition for a hearing was allowed, said decision holding that the case under consideration is in its essential features analogous to the case of the South Star lode, and further:

"Although the claimant for the Kohnyo lode excluded the ground in conflict with the patented Mt. Rosa placer claim, said lode if known to exist at the date of the placer application," under the terms of exception of the placer patent did not pass to "the placer patentee, but the title to the same remains in the United States in trust for the lode claimant, if said claimant," as is alleged, remained in possession of said lode.

"The question now to be determined is whether the lode was

"known to exist within the boundaries of the patented placer claim
 "at the date of filing the placer application. In view of the above

67 "you are hereby directed to notify claimants for the Kohnyo
 lode that they will be allowed thirty days within which to
 apply for an order for a hearing to be by them" served in
 accordance with the rules of practice, at which to determine,

I. Whether the said Kohnyo location contains a valuable "lode
 "or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

"II. Whether such lode was known to exist at date of filing ap-
 plication for the Mt. Rosa placer claim."

On December 8, 1895, resident counsel for John McConaghy, assignee of patentee for the Mr. Rosa placer, filed a motion for review of said office decision of September 16, 1895, and a revocation of the order for a hearing.

By letter N. dated January 8, 1896, said motion for review was denied and the order for a hearing affirmed as the decision of this office.

I am now in receipt of a letter dated January 22, 1896, from resident counsel for John McConaghy assignee of the Mt. Rosa Mining, Milling and Land Company, forwarding an appeal from my said decision dated September 16, 1895, and January 8, 1896, and containing specifications of error as follows:

I. Error in holding by implication that the Kohnyo claimant was entitled to show possessory title to the conflict between its claim on the Kohnyo lode and the patented Mt. Rosa placer, when by its own acts it expressly waived any possessory right or title to the ground by excluding the same from its publication and entry as well as from its application for patent.

68 II. Error in not holding that the express waiver by the Kohnyo claimant of the ground in conflict, operated as a bar to the setting up of possessory title, and by reason of the fact that the same had passed from the jurisdiction of the United States by letters patent, constituted in so far as the lode claimant is concerned, estoppel by the record.

III. Error in not holding that the expressed disavowal of the Kohnyo claimant of all intention to claim any portion of the conflict between the lode and the placer claim, and in making final entry of the lode excluding the said conflict with the said placer claim, created an estoppel *in pais* which forever barred this claimant for the lode from ever acquiring title to the conflicting placer ground (100 U. S., 578).

IV. Error in not holding that the record itself bars the Kohnyo claimant, and in itself furnishes a sufficient defense for the placer owner in law as well as in equity.

V. Error, in view of the foregoing, in not denying the petition for a hearing, no cause of action being disclosed.

Under rule 81 of practice an appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the

public lands and to private land claims, except in case of interlocutory orders and decisions and orders for hearing or other matter resting in the discretion of the Commissioner.

In the case under consideration the order directing a hearing is not such a final determination of the rights of the parties as would entitle the protestants to the right of appeal.

The appeal of protestants from my decision of September 16, 1895, and January 8, 1896, will not therefore be entertained, and you will so advise parties in interest, and that the case will remain suspended under rule 85 of practice.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

a/3

U. S. LAND OFFICE, }
Pueblo, Colorado, } ss:

I, J. R. Gordon, hereby certify that the foregoing has been compared with the original and found to be a true and correct copy.

J. R. GORDON, Register.

18.

70

EXHIBIT E.

Copy.

1542.

F. L. C.

DEPARTMENT OF THE INTERIOR, G. B. G.
WASHINGTON, April 7, 1896. E. M. R.

In re KOHNYO LODE }
v. }
MT. ROSA PLACER CLAIM. }

The Commissioner of the General Land Office.

SIR: This is an application made by John McConaghy, assignee of the Mt. Rosa Mining Milling and Land Co., for a writ of certiorari, directing your office to transmit to the department the record in the above entitled case for consideration upon its appeal from the decision of your office of Sept. 16, 1895, directing the local officers at Pueblo, Colorado, to notify the claimants for the Kohnyo lode that they will be allowed thirty days in which to apply for an order for a hearing to determine whether the Kohnyo location contains a valuable lode or vein of mineral quartz within the Mt. Rosa placer limits, and whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim.

McConaghy's appeal was filed January 22, 1896, February 5, 1896, your office decided that McConaghy had no right of appeal and suspended action on the case under rule 85 of practice.

Under rule 81 of practice no appeal will lie from the decision of your office. The application is therefore denied.

71

The papers transmitted with your office letter " N " of March 7, 1896, are herewith returned.

Very respectfully,

JNO. M. REYNOLDS,
Act'g Secretary.

U. S. LAND OFFICE, }
Pueblo, Colo., } ss:

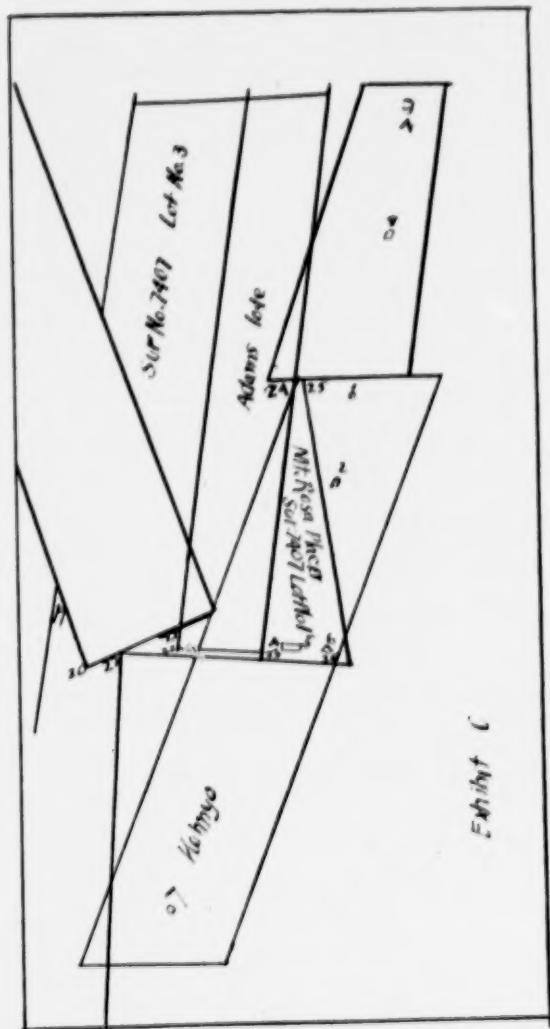
I, J. R. Gordon, do hereby certify that the foregoing has been compared with the original on file in this office, and found to be a true and correct copy thereof.

J. R. GORDON, Register.

Pueblo, Colo. June 5, 1900.

(Here follows diagram marked p. 72.)

nos. 98 + 99 }
 Shall } p. 72
 Crown }



EX "C"

Exhibit C



73

EXHIBIT "F."

Contest 1314.
1897-58484.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 22, 1897.

Register and receiver, Pueblo, Colorado.

SIRS: The evidence submitted at the hearing in the case of the Cripple Creek Gold Mining Company v. The Mt. Rosa Mining, Milling and Land Company and John McConaghy, assignee,—contest No. 1314, which involves ground in conflict between the patented Mt. Rosa placer claim, survey No. 7407, and the Kohnyo Lode claim, survey No. 8612, was received at this office June 22, 1897, and the entire record has been carefully examined.

The Mt. Rosa placer claim was located *September 19, 1891*, and the survey thereof was approved July 26, 1892.

August 5, 1892, the Mt. Rosa Mining Milling and Land Company filed an application for patent, which included the Mt. Rosa placer claim and the Adams, Jefferson, Mt. Rosa, Gold Coin and Rosa Lee Lode claims. Notice of said application was published from August 19, 1892, and including October 21, following.

November 7, 1892, mineral entry No. 259 was allowed embracing the mining claims described in said application for patent.

The evidence submitted in support of said entry having been examined and found satisfactory, and no adverse nor protest having been filed against said application or entry, patent No. 22774 was issued thereon *April 24, 1893*.

74 In said application, entry and patent there was no express exclusion of the ground in conflict with the Kohnyo Lode claim, but said patent contains the usual recitals excluding known lodes.

The Kohnyo lode was located *October 2, 1891*, and the survey thereof was approved February 26, 1894.

March 7, 1894, The Cripple Creek Gold Mining Company, the contestant herein, claiming the Kohnyo and Fortuna Lode claims, filed its application for patent.

March 6, 1895, no adverse claim nor protest having been filed against the application for the lode claim last mentioned, and the evidence submitted in support thereof being deemed satisfactory, you thereupon allowed mineral entry No. 573.

In the published notice of the application for patent for the Kohnyo claim, the application to purchase, the register's final certificate and the receiver's receipt, the ground in conflict with the Mt. Rosa placer was expressly excluded.

May 28, 1895, the evidence submitted in support of said entry No. 573 was examined and thereupon a decision was rendered from which I quote:

By said above intersections the Kohnyo lode is divided into two

non-contiguous tracts; the tract lying north of said placer claim extending about 500 feet in length along the lode line and containing the discovery shaft and improvements, while the tract on the southerly end of the claim extends for a distance of about 700 feet.

Under departmental decision dated February 23, 1893, in case of the Silver Queen lode, a lode claim intersected by a prior
75 placer location cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D. 186.

The right of the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

The claimant-company may, however, elect which of said tracts it desires to retain, the 500 feet on the north or the southerly 700 feet. If the latter tract is retained evidence of discovery of mineral thereon and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days in which to furnish required evidence or to appeal, in default of which the entry will be canceled to the extent of that portion of the claim lying south of the patented Mt. Rosa claim, without further notice.

No appeal was taken from said decision, but, with your letter of August 14, following, you transmitted contestant's corroborated petition, which in effect is as follows: That the Kohnyo Lode claim contains a vein or fissure of gold bearing rock with well defined walls extending throughout, from one end line to the other; that said vein has been opened and developed in such manner as to prove that it intersects and passes through all that part of the Mt. Rosa placer claim conflicting with said lode claim, and extends throughout the placer for a distance of about 350 feet; that said vein was, at the time of filing the application for said placer claim, claimed
and known to exist; that the locators of said lode claim and
76 their grantees have at all times since the location held,

worked and possessed said vein; that according to the decision in the case of the South Star Lode claim, 20 L. D. 204, an application for patent may be made for the vein and surface ground in conflict between the Kohnyo survey and the patented Mt. Rosa placer claim, and that application is, therefore, made that petitioner be allowed to make supplemental application for patent embracing the area in conflict between the Kohnyo Lode claim and said placer claim after inquiry has been made as to the existence of said vein, according to the rules and regulations of this office.

Said petition was considered, and by office letter of September 16, 1895, a hearing was allowed to determine:

1. Whether the Kohnyo location contains a valuable lode or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

2. Whether such lode was known to exist at date of filing application for the Mt. Rosa placer claim.

December 9, 1895, the attorney for John McConaghy, assignee of the Mt. Rosa Mining, Milling and Land Company, filed in this office

a motion for review and revocation of the decision of September 16th, 1895.

Said motion was considered and by office letter dated January 8, 1896, it was denied.

January 23rd, 1896, the defendants filed an appeal from the decision of September 16, 1895, and January 8, 1896, and this office by its decision of February 5, 1896, held that the defendants had no right of appeal, and the same was not therefore entertained.

February 25, 1896, the attorney for defendants filed an application for writ of certiorari, which was denied by the departmental decision dated April 7, 1896, in which it was held, that under rule 81 of practice, no appeal would lie from the decisions complained of.

October 26, 1896, both parties, with counsel and witnesses appeared at your office, and the hearing was regularly held in accordance with the order contained in office letter of September 16, 1895.

May 1, 1897, you rendered your joint decision upon the evidence submitted. That portion of your decision which follows your statement of the case, is as follows:

The issue upon which testimony was submitted is:

1. Whether the said Kohnyo location contained a valuable lode or vein of mineral bearing quartz, within the Mt. Rosa placer limits.

2d. Whether such lode was known to exist at the date of filing application for the Mt. Rosa placer claim.

A review of the testimony shows conclusively that the contestants have failed to establish the affirmative of either proposition. The three locators, McRay Brothers and Leonard, the superintendent of the work on the claim, the only witnesses for the protestants who had knowledge of the ground in conflict prior to the date of application for the Mt. Rosa placer, August 5, 1892, do not testify that a known lode existed at that time on said ground, but that they believed the veins opened at 1 and 2, "Exhibit C," intersects the placer ground. No testimony whatever was offered to show that any vein was known to exist when application was made for placer patent.

On behalf of the claimants the testimony of witness Wilson, Hills and Spicer was that they had made careful examination of the ground in conflict for the purpose of ascertaining if any veins or lodes existed at the date of application, and none could be found.

The register and receiver are of the opinion the protest should be dismissed.

June 1, 1897, the contestant filed an appeal from your decision, with specification of errors alleged therein. The specification of errors is as follows:

First. A review of the testimony does not show conclusively that the protestants have failed to establish the affirmative of either proposition.

Second. That the finding by the register and receiver that "the

three locators McRay Brothers and Leonard, the superintendent of work on the claim, the only witnesses for the protestants who had knowledge of the ground in conflict prior to the date of application of the Mt. Rosa placer, August 5, 1892, do not testify that a known lode existed at that time, but that they believed that the vein opened at 1 and 2, Exhibit C, intersected the placer ground," is erroneous and contrary to such evidence.

Fourth. That the finding by the register and receiver that "the testimony of Wilson, Hills and Spicer was that they had made careful examination of the ground in conflict for the purpose of ascertaining if any veins or lodes existed at date of application, and none could be found" is erroneous and contrary to the evidence.

79 Third. That the finding by the register and receiver that "no testimony whatever was offered to show any vein was known to exist when application was made for the placer patent" is erroneous and contrary to the evidence.

Fifth. That the dismissal of the application or protest of The Cripple Creek Gold Mining Company v. The Mt. Rosa M. M. & L. Company is manifest and material error and contrary to the evidence and law.

Contestant's argument contains a motion to vacate your decision, and in support thereof it is stated that Rope, Key & Co., bankers and brokers, made advertisement in the Mining Investor of July 10, 1897, a mining journal published at Colorado Springs, Colorado, as follows: Investors desiring large profits with a minimum of risk should purchase mining stock on this market at their present low prices.

We believe that A. J., Isabella, Gold Standard, Mt. Rosa, Gould, Bluebell, Jack Pot and Garfield Grouse are good stocks to buy.

It is claimed that Mr. Key, member of said firm of bankers and brokers, and Mr. Key, the receiver, are one and the same person, and that this fact, taken in connection with an order dated March 3rd, 1896, in which the receiver, contrary to orders from this office, notified contestants that this case was dismissed for want of prosecution, show that the receiver ought not to have participated in the trial of this case.

I have carefully considered the evidence bearing upon the question raised by this motion, and have reached the conclusion that it has not been shown that the receiver had any property interest in the premises involved herein, or any interest of any kind which would disqualify him to act officially in the decision of this case. See *Emblen v. Wood*, 17 L. D., 220.

The attorney for contestees in this argument filed August 7, 1897, submits a motion as follows:

In view of the fact that Messrs. Smith, Leonard and Keith, witnesses for contestant, admit that their knowledge of the land was acquired subsequent to the filing of the Mt. Rosa placer application, and that it was shown at the hearing and by the official survey of the Kohnyo lode that shafts Nos. 2, 4, 5, 6, and 7, and cut No. 3 (Ex-

hibit C) were made long after the filing of said placer application, we now move that the testimony of said Smith, Leonard and Keith as a whole, be stricken from the record, and that any and all testimony relative to discoveries and developments in said shafts and cut mentioned above, be ruled out of consideration and declared inadmissible because immaterial, irrelevant and incompetent to prove any issue to be tried, and we respectfully ask a definite ruling upon this motion.

The issue between these parties must be determined upon due consideration of the *competent evidence* submitted in the case, and the testimony of the witnesses named in the last mentioned motion, as well as that of the other witnesses will be examined in order to ascertain the weight to be given thereto, under the recognized rules of evidence.

Contestee's motion is therefore denied.

For the purpose of convenient reference, Exhibit "A," which was delineated from the approved plat of the survey of the Kohnyo Lode claim, and a copy of contestant's Exhibit "C," which was regularly introduced in evidence at the trial of the case, are attached hereto.

Upon the trial of this case seven witnesses testified on behalf of the contestants, and six testified on behalf of contestees.

The evidence clearly and satisfactorily shows that a valuable gold bearing vein, between well defined walls, was discovered in the discovery shaft of the Kohnyo claim, and in the other shaft shown on Exhibit "A," prior to August 5, 1892. At that time the discovery shaft was about eleven feet deep, and the other about thirty-five or forty. Said discoveries, considered independent of any other facts, would not sustain the allegation that a valuable mineral bearing vein or lode was known to exist within the limits of the ground in conflict between the Kohnyo Lode claim and Mt. Rosa placer, and at the time of filing said application for patent. In support of this proposition the following, which occurs in the decision of *Dahl v. Raunheim* (132 U. S. 263) is quoted.

The discovery by the defendant of the Dahl lode, two or three hundred feet outside of these boundaries, does not, as observed by the court below, create any presumption of the possession of the vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them.

The contestant in this case, however, does not rely solely upon the discoveries made in the discovery shaft, and the other shaft shown on Exhibit "A" to sustain its material allegations, but its contention is that the course of the veins disclosed in these shafts, the disclosures made in shaft No. 2 and the other excavations shown on Exhibit "C" by the figures 3, 4, 5, 6, and 7, made subsequent to the placer applications, and the outcroppings visible at all times, show that a well defined vein was known to exist within the ground in conflict when said placer application was filed.

The testimony relative to the course of the veins disclosed in the

shafts shown on Exhibit "A" is so conflicting as to be of little value in determining the issues involved in this case.

The evidence shows, that subsequent to the filing of the placer application, several small excavations were made within the limits of the ground in controversy, and that mineral bearing veins were exposed thereon, but these disclosures standing alone would not sustain the contestant's case.

Upon a careful consideration of the entire record I am satisfied that the decision in this case depends upon the conclusions to be drawn from the testimony relative to the outcroppings and float within the limits of the ground in controversy, taken in connection with the disclosures made in the shafts shown on Exhibit "A," within the Kohnyo claim, and upon this point I deem the following to be a fair synopsis of the testimony.

C. E. McRay for the contestant testified, in effect, that he was one of the locators of the Kohnyo claim; that the discovery hole was sunk on a vein about two and a half feet wide, between well defined walls; that the vein outcropped north of location stake, also
83 south; that he found outcroppings nearly the entire length of the claim; that the outcroppings consist of quartz rock more or less *altered* with mineral, and that in 1892, he found the outcroppings of three veins in the Kohnyo claim, one of which run a little east of south, and the other in a southerly direction.

C. F. McRay, for contestant, testified that he was one of the locators of the Kohnyo claim; that there was float all along on the slope of the hill south of the discovery or down as far as across the gulch; that he was satisfied from the float on the side of the hill that there was a vein there; that the ground in controversy is in the gulch and on the other side; that his brother did some work in 1882 on the southern part of the Kohnyo; that his brother called his attention to a small hole that showed mineral, just prospected, and that this hole appeared to be in rock in place, a kind of blow-out with streaks of mineral through it which he thought indicated a vein.

J. E. McRay, for contestants, testified that he was one of the locators of the Kohnyo, and there are two veins outcropping on said claim.

J. F. Smith, who, subsequent to the application for patent to the placer claim, surveyed the Kohnyo claim, testified for the contestants that, referring to Exhibit "C," there is a red mark across the trench near 4 that represents the outcrop of a vein; that last Friday he followed through from 7 to the north of the gulch, where shaft
84 No. 2 is, and nearly all the way, except in the bottom of the gulch where the wash is deep, there was an indication of an outcrop, which in some places seemed to be in place, particularly between 4 and the south end of the claim; that a little west of there is an outcrop that seemed to run nearly north and south.

W. H. Leonard, for contestant, testified that he performed some work on the Kohnyo claim in 1894; that there is a vein that shows

from dump of shaft 1, Exhibit "C," which can be traced by walking along the line of the claim, except where it runs through the gulch, where it is covered with debris; that the surface of that claim is of such character that said rock can be run from place to place, in places it has the appearance of being solid, and in other places the wash would be a few feet deep, in the gulch probably more; that these outcroppings occur in rock in place, especially on that part of the hill, where the discovery is.

C. A. Keith, for contestant, testified that he examined the Kohnyo claim in 1893; that he saw outcroppings in a good many places; that in crossing the gulch the vein disappears to some extent, but can be followed on each side, you cannot see it in all places except by a little excavation; that the character of the outcroppings is granite, a ridge of granite quartz the same as many other croppings in that granite country, and the ore is of the nature of granite quartz; that the vein cropping as he traced it is northeast and southwest, or south probably sixteen to twenty degrees; that the vein is disclosed in the discovery shaft and can be traced in about that course out of the south end line in the form of an outcrop.

On this question of outcroppings the following witnesses
85 testified on behalf of the contestees in effect as follows:

G. S. Wilson testified that he was one of the locators of the Mt. Rosa placer; that to the best of his knowledge and belief there was no vein or lode known to exist within the ground in conflict at the time the placer application was filed; that there are no distinct vein croppings of the Kohnyo next to the placer, that there are boulders apparently granite, croppings here and there, but not in a continuous line, and they do not give the appearance of a true vein.

V. G. Hills, a mining engineer testified that he made the survey of the Mt. Rosa placer; that he made two careful examinations of the ground in controversy prior to August 5, 1892; that the ground in conflict is in a ravine between two ridges; that there is too much soil everywhere to disclose outcroppings except in the very summit of the two ridges; that just prior to August 5, 1892, he made an examination of the ground included in the placer to see whether there was any known lode; that there was no known lode known to exist at that time on that ground, that there was no evidence of any outcrop on the north end of the Kohnyo that can be traced, there are evidences of vein formation on the surface, but those evidences are not sufficiently definite for the purpose of showing whether they run in the same direction, aside from excavations, the veins cannot be traced; that he does not believe there are any solid croppings of rock in place on the ground in conflict, and that there is no continuity of outcroppings on the Kohnyo that indicates a vein.

J. C. Spicer testified that he had examined the ground in
86 conflict prior to the application for the placer patent, and that no vein or lode was known to exist in the ground.

I hold that the rule of law, announced in *United States v. Iron*

Silver Mining Co. (128 U. S., 683-684) is applicable to the facts obtained from the testimony in this case. Said rule is contained in the following quotation :

It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascertained and be of such extent as to render the land more valuable on that account and justify their exploitation. Although pits and shafts had been sunk in various places, and what are termed mining cross cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand, and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed when the application for the patent was made. The subsequent discovery of lodes upon the ground and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time.

Upon a careful consideration of the entire record in this case, including the able briefs and arguments of counsel, I have reached the conclusion, from the evidence, and accordingly so decide, that the contestant has failed to show, by a clear preponderance of 87 the evidence that at the time of the application for patent for the *Mt. Rosa placer claim* was filed, it was known that the ground in controversy herein contained a valuable vein or lode bearing mineral. Your decision as to the facts is, accordingly, modified, and contestant's petition to be allowed, under departmental decision in case of the *South Star Lode claim*, (20 L. D., 204), to enter and receive a patent for the ground in controversy is hereby denied.

Notify the parties in interest hereof, and at the proper time transmit evidence of service, together with all papers filed, and your report as required by circular approved October 28, 1886, 5 L. D., 204.

Very respectfully,
2.14.

BINGER HERMANN,
Commissioner.

88

EXHIBIT G.

U. S. L. O., Pueblo, Colo.

Received — o'clock — m., May 19, 1898, from — mail counter.

Vol. 26-62. DEPARTMENT OF THE INTERIOR, P. J. C.
 W. V. D. WASHINGTON, May 7, 1898. F. L. C.

THE CRIPPLE CREEK GOLD MINING COMPANY }
 v.
 THE MT. ROSA MINING, MILLING AND LAND CO. }

The Commissioner of the General Land Office.

SIR: The Mt. Rosa placer, survey No. 7407, Pueblo, Colorado, land district was located September 19, 1891, application for patent thereto was made August 5, 1892, and patent was issued April 24, 1893. The placer application stated that certain veins or lodes were situate within the boundaries of the placer claim, some of which were included in, and others excluded from the application, but it contained no mention of the Kohnyo vein or lode.

89 March 7, 1894, the Cripple Creek Gold Mining Company made application for patent, for the Fortuna and Kohnyo Lode mining claims, survey No. 8612. The Kohnyo claim was located October 2, 1891, after the location of the placer claim and before the application for the placer patent, and is intersected about its center by one corner of the placer which extends across the lode claim from one side line to the other, thus dividing the lode claim into two non-contiguous tracts. The Kohnyo claimant did not advertise the placer application.

August 10, 1895, the Kohnyo claimant filed in your office in connection with the prosecution of its application for patent, a petition alleging that the Kohnyo vein or lode was at the time of the placer application, known to exist within the boundaries of the placer and was therefore excepted and excluded from the placer patent, and asking that in the event of its establishing this allegation, it be permitted to obtain patent to the ground in conflict under the ruling of the South Star lode (20 L. D., 204).

On consideration of this petition your office, by letter of September 16, 1895, held that if said vein or lode was known to exist when the placer application was made, August 5, 1892; the title thereto remained in the United States and could not be acquired under the laws relating to lode claims, and ordered a hearing to determine the truth of the lode claimant's allegations.

A hearing was had before the local officers, who held that no vein or lode was known to exist within the ground in conflict at the date of the placer application. On appeal, your office October 22,
 90 1897, affirmed this decision. The case is now before the department on further appeal by the lode claimant, who alleges

error in this finding of the local office and of your office and in a ruling requiring the lode claimant to assume the burden of proving the known existence of the vein or lode at the time of the placer application.

In 1891 a shaft was sunk in the Kohnyo location about ten and one half feet deep, in which a vein or lode of mineral was discovered and in 1892 a second shaft was sunk therein to a depth of twenty and twenty-five feet, prior to August 5, 1892, the date of the placer application. The work in this second shaft disclosed two or three small veins, but whether any of them was the vein disclosed in the first shaft was not known. Both shafts were outside of the placer boundaries and near the northerly end of the lode claim, being distant about two hundred feet from the intersection of the claimed vein with the placer boundary. These veins or lodes had not been shown at that time to possess mineral of sufficient quantity and quality to give them commercial value or to justify expenditure in their extraction. So far as disclosed the veins or lodes in the two shafts appeared to take the general direction of the lode claim and their continuous existence in that direction for the full length of the claim would have carried them through the conflicting portion of the placer, but their presence either within the placer boundaries or in the southerly end of the lode claim was not shown by any discovery or development before the application was made for the placer patent. During the years 1891 and 1892 some small

91 holes were dug in the northerly and southerly ends of the lode claim and outside of the placer boundaries, but they did not disclose the presence of any vein or lode. This is all that was done in the way of discovery and tracing of the vein in question prior to the date of the placer application. Much testimony was produced at the hearing respecting the subsequent discovery and tracing of a vein or veins across and through the ground in conflict, but since the rights of the placer patentee are to be determined by the conditions prevailing at the date of the placer application, evidence of subsequent discovery and development cannot throw any light upon these conditions and should not be considered. Such subsequent discovery and development could not act retrospectively and change or affect the knowledge possessed by the placer claimant or others at the time of the application for placer patent. Upon this question it was said in *United States v. Iron Silver Mining Co.* (128 U. S., 673, 683):

Lodes and veins in quartz or other rock in place, bearing gold or silver or other metal, were not disclosed from the application for the patents placer was made. The subsequent discovery of lodes upon the ground and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time.

See also *Sullivan v. Iron Silver Mining Co.* (143 U. S., 431, 434).

It is contended that the Kohnyo vein is shown to have outcropped throughout the length of the lode claim, including the conflict with

92 the placer, to such an extent as to be visible to one making an examination of the surface, and that this charged the placer claimant with knowledge of its existence. The evidence on the part of the lode claimant upon this point is not convincing. While some of the witnesses say, in a general way, that the vein did so outcrop, the substance of their testimony is that "float" more or less stained with mineral, was found on the surface of the claim at different points, but that these indications could not be traced continuously through the claim or through the ground in conflict. One of these witnesses, an original locator of the Kohnyo, says: "We could not tell whether it was float from this vein or not."

The testimony on behalf of the placer patentee is to the effect that these so-called outcroppings consist of granite boulders not in a continuous line, and not having the appearance of a vein; that there is too much soil everywhere on the claim except on the summit of the ridges to see an outcrop and that in the gulch or ravine it was more than eight feet through the wash to the solid formation.

That portion of section 2333 of the Revised Statutes which controls this case reads as follows:

" * * * And where a vein or lode * * * is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode-claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

93 The application for the placer patent did not include an application for the Kohnyo vein or lode, and it necessarily follows from the language of the statute that if that vein or lode was known to exist within the placer boundaries at the time of the placer application, the failure of the placer claimant to include therein an application for such vein or lode must be construed as a conclusive declaration that it had no right or claim thereto. Upon the other hand, if the existence of the vein or lode in the placer claim was not known at that time, by the terms of the statute it was embraced in the placer patent and conveyed to the patentee therein.

The questions therefore which arise upon the record and upon the lode claimant's appeal are:

First. Whether it is shown that this vein or lode was known to exist within the placer boundaries at the time of the placer application; and

Second. Whether the burden of proving such known existence was rightly placed upon the lode claimant.

It is contended that the location of the vein or lode October 2, 1891, based upon a discovery made outside of the placer boundaries and about two hundred feet to the north thereof gave it the status

of a known vein or lode within the meaning of the statute, even though the actual existence thereof had not been discovered, either within or to the south of the placer claim. The existence of a vein or lode is necessary to the making of a lode location. The thing located is a mineral-bearing vein or lode, and the surface ground which can be taken "along the vein or lode" is an incident thereto, intended to facilitate the convenient and safe working of the mine. Where the existence of a vein or lode within a placer claim is otherwise unknown, its existence is not made known by the mere inclusion of that ground within a lode location. The marking of a lode claim upon the ground, and the recording of a location notice, may actually or constructively extend to others the knowledge upon which the lode claimants based their location, but it cannot make known a vein or lode the existence of which is otherwise altogether unknown. The fact that the surface area in conflict was claimed under the lode location prior to the placer application, is not in itself controlling, for if, in fact, the vein or lode was not known to exist within the placer boundaries at that time it was conveyed to the placer claimant by the placer patent. The statute so provides in clear and unambiguous terms. In *Iron Silver Mining Co. v. Reynolds*, (124 U. S., 374, 382) the court said: "The statute does not except veins or lodes" *claimed* or known to exist" but only such as are "known to exist," and it fixes the time at which such knowledge is to be had as that of the application for the patent.

The Supreme Court has had frequent occasion to consider and determine what constitutes a known vein or lode. In *United States v. Iron Silver Mining Co.* (128 U. S., 673, 783) it was said:

"It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold, or silver or other metal to justify their designation as "known" veins or lodes. To meet that designation the veins or lodes must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

In *Dahl v. Raunheim* (132 U. S. 260, 263) referring to the claimed existence of a known vein or lode within a placer claim at the time of the application for placer patent, the court said: * * * there was no evidence of any lode existing within the boundaries of his claim, either when the plaintiff made his application or at any time before. The discovery of the defendant of the Dahl lode, two or three hundred feet outside of these boundaries does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them.

In *Iron Silver Mining Co. v. Mike and Star Co.* (143 U. S., 394, 404) the court said:

It is undoubtedly true, that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of

mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute.

In *Sullivan v. Iron Silver Mining Co.*, (143 U. S., 431, 435) the court held :

And after that, defendants offered a mass of testimony, the scope of which was similar to that condemned as insufficient in the case of *Iron Silver Mining Co. v. Reynolds*, *supra*. Its purport was that it was commonly believed that underlying all the country in that vicinity was a nearly horizontal vein or deposit, frequently called a blanket vein ; and that the parties who were instrumental in securing this placer patent shared in that belief, and obtained the patent with a view to thereafter developing such underlying vein. But whatever beliefs may have been entertained generally, or by the placer patentees alone, there was up to the time the patent was obtained no knowledge in respect thereto. It was so far as disclosed by this testimony on the part of everybody, patentees included, merely a matter of speculation and belief, based not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory. Such a belief is not the knowledge required by the section. In the case referred to this court said : "There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge, and thus in effect incorporate new terms into the statute."

See also *Migeon et al. v. Montana Ry. Co.*, (77 Fed. Rep., 249; U. S. App., 724).

The rulings of the Supreme Court upon the exception of mining claims from townsite patents are also worthy of consideration in this connection. In *Dower v. Richards* (151 U. S., 658, 663) it was said :

It is established by former decisions of this court, that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals when the townsite patent takes effect ; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them ; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterward discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the townsite patent. *Deffeback v. Hawke*, 115 U. S. 392; *Davis v. Weibold*, 139 U. S., 507.

Examined and considered in the light of these decisions the evidence in the case at bar, as hereinbefore summarized, does not show that any vein or lode was known to exist within the ground in conflict when the placer patent was applied for. This conclusion receives some support in the conduct of the lode claimant. If the lode location embraced a vein or lode, the existence of which within the placer boundaries was then ascertained and known, an adverse claim duly filed and prosecuted would have resulted in the direct and special exclusion from the placer patent of such known lode or vein, and the adjoining surface area rightfully incident thereto. While the exception of a known vein or lode not applied for by the placer claimant does not depend upon the filing and prosecution of an adverse claim, the fact remains that this course presents the most effectual means of obtaining a final and satisfactory determination and adjustment of the rights of the conflicting claimants. The lode claimant, however, did not adverse the placer application, but permitted the issuance of a patent for the area in conflict, as 98 placer ground, April 24, 1893, March 7, 1894, it made application for patent for the lode claim excluding therefrom and from the published and posted notices thereof the area in conflict and mineral entry thereof likewise excluding the conflict, was made March 6, 1895. It was not until after your office had ruled that the non-contiguous tracts upon either side of the intersecting placer claim could not be entered as one lode claim and had required the lode claimant to elect which of the two tracts it would take, that any right was asserted under the lode claim to the area in conflict. Under these circumstances it was that the existence of a vein or lode within the placer boundaries was alleged to have been known when the placer application was made. While this subsequent conduct of the lode claimant could not alter or change the conditions existing at the time of the placer application and by which the rights of the parties must be determined, it may properly be referred to and considered as tending to show the lode claimant's estimate and opinion of those conditions and its rights thereunder.

The placer claimant has a Government patent for the land in controversy, obtained upon a showing held by the Land Department to establish the placer character thereof, and the lode claimant has attacked that patent alleging that this land contained when the patent was applied for a known vein or lode and was therefore excepted from the operation of the patent. This allegation amounts to nothing if not sustained by proof. The placer patentee was certainly not called upon to support the title apparently conferred by the patent simply because it was assailed by some one who 99 found therein an obstacle to the obtaining of title to the same ground. It was therefore incumbent upon the lode claimant to establish the truth of its allegations, and the burden of proving them was rightly placed upon it. *Discovery Placer Claim v. Murry* (25 L. D., 460, 463).

For the reasons stated your office decision is affirmed.

Herewith are returned the papers.

Very respectfully,

C. N. BLISS, Secretary.

U. S. LAND OFFICE, } ss:
Pueblo, Colorado, }

I, J. R. Gordon, do hereby certify that the foregoing has been compared with the original on file in this office and found to be a true and correct copy.

J. R. GORDON, Register.

June 6, 1900.

100

EXHIBIT H.

STATE OF RHODE ISLAND, } ss:
County of Providence, }

Lyman B. Goff, of lawful age, being first duly sworn deposes and says that he is the duly elected and acting president of the Cripple Creek Gold Mining Company, which company is the owner of the Kohnyo and Fortuna Lode mining claims, covered by Pueblo, Colorado, mineral entry No. 573, which was made March 6, 1895.

Affiant says that he has been fully advised as to the contents of a letter or decision of the Commissioner of the General Land Office of date May 28, 1895, and of the decision of the Secretary of the Interior of date May 7, 1898.

With authority so to do, affiant hereby waives the right of review of the last mentioned decision, and elects to retain in said M. E. No. 573, that portion of the Kohnyo Lode claim which is described in the above mentioned letter of the Commissioner as "the five hundred feet on the north."

Further affiant saith not.

(Signed)

LYMAN B. GOFF.

Subscribed and sworn to before me, this 10th day of June, A. D. 1898.

(Signed)

ANDREW M. HULL,
Notary Public.

[SEAL.]

Election by C. C. G. M. Co. to take north tract.

101

EXHIBIT I.

1899-31010.

" 43116.

N.

C. A. B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 27, 1899.

Register and receiver, Pueblo, Colorado.

SIRS: March 6, 1895, the Cripple Creek Gold Mining Company made mineral entry No. 573 for the Kohnyo and Fortuna Lode claims embraced in mineral survey No. 8612, but, in said entry, the conflict with the Mt. Rosa patented placer claim, mineral survey No. 7407, was expressly excluded.

By said conflict and exclusion, the Kohnyo Lode claim was divided into two non-contiguous tracts; the tract lying north of said placer containing the discovery shaft and improvements. See attached diagram.

Upon the examination of said entry a decision was rendered May 28, 1895, from which I quote:

Under departmental decision dated February 23, 1893, in case of the Silver Queen lode, a lode claim intersected by a prior placer location, cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D., 186.

The right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

102 The claimant company may, however, elect which of said tracts it desires to retain, the five hundred feet on the north or the southerly 700 feet. If the latter tract is retained evidence of discovery of mineral thereon, and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days within which to furnish required evidence or to appeal, in default of which the entry will be cancelled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice.

Should this decision become final, an amended survey will be required, establishing the southerly end line of the claim at the point where the lode intersects the placer claim.

Upon the rendition of said decision the claimant of the Kohnyo Lode claim filed a petition to be allowed to amend its entry by including therein the ground in conflict with said placer claim, and upon said petition contest No. 1314, The Cripple Creek Gold Mining Company v. The Mt. Rosa Mining and Milling and Land Company ensued, which contest has been finally decided adversely to the Kohnyo claimant. See 26 L. D., 622.

From letter of July 15, 1898, relative to said entry No. 573, I quote:

In view of the fact that no motion for review of the departmental decision of May 7, 1898, affirming the decision rendered by this office May 28, 1895, was filed within the time prescribed by rules of practice, the decision last mentioned became final and it now devolves upon this office to execute the same.

103 In view of the foregoing said mineral entry is hereby canceled as to the Kohnyo claim except as to that portion of the ground lying easterly of line 25-26, survey No. 7407, for the Mt. Rosa patented placer claim.

The claimant of the Kohnyo Lode claim will be allowed sixty days from due notice hereof within which to take the proper steps to have the amended survey made in accordance with the decision of May 28, 1895, and in case of default, said entry will be canceled in its entirety.

The surveyor general of Colorado, with his letter of February 24, 1899, submitted the approved field notes and plat of an amended survey of the Kohnyo and Fortuna Lode claims. The boundaries of the Kohnyo claim and the lode line as shown upon the amended plat are indicated by blue lines upon the attached diagram.

A careful examination of the original survey of, and the application for patent for said lode claims discloses that the applicant applied for a lode vein beginning at the discovery shaft of the Kohnyo and running N. 20° 40' E. 70 feet and S. 20° 40' W., 1319.9 feet.

Upon the plat of the amended survey the line of the Kohnyo Lode vein is described as beginning at the same discovery shaft and running N. 7° 20' E., 67.51 feet, and S. 7° 20' W., 495.87 feet.

With your letter dated March 7, 1899, you transmitted the protest of John McConaghy, against the approval and acceptance of the amended survey in this case.

104 The protest is corroborated, and therein the protestant alleges, in substance, that he is the owner of the Hypatia Lode claim, which conflicts with the Kohnyo Lode claim as described in the amended survey thereof; that in the amended survey the southerly end line is established at a point far south of that at which the Kohnyo vein intersects line 25-26 of the Mt. Rosa placer claim, and that the deputy mineral surveyor has attempted to mislead this office into the idea that the Kohnyo lode intersects the southerly end line as shown in the amended survey.

The protestant further alleges that his rights on the Hylatua Lode claim would be interfered with and destroyed by establishing the southerly end line as established by the amended survey.

April 10, 1899, the attorneys for the entryman submitted a request or motion to have patent issued without further delay for the Fortuna Lode claim, leaving the entry intact as to the Kohnyo claim, and the question of issuance of patent therefor to be determined subsequently.

There is an apparent issue of fact between the entryman and this

protestant as to the true position and course of said vein. The entryman's contention, as indicated by the amended survey being that the true lode line does not intersect line 25-26 of the said placer claim at the point indicated by the original survey, but at a point considerably south thereof shown by the plat of the amended survey. With this contention the protestant takes issue and alleges that the Kohnyo vein does not take the direction indicated
 105 on the amended plat, and that the location is void beyond the point where the Kohnyo vein intersects the patented placer as claimed by the applicant at the time of the hearing heretofore had.

Carefully considering the protest in connection with the entire record in the case, a serious doubt arises as to the position and course of the Kohnyo vein. Therefore you will notify said protestant that he will be allowed thirty days within which to apply for an order for a hearing at which evidence may be submitted by both parties to determine the true position and course of the Kohnyo vein, and to determine further at what point said vein on its southerly strike intersects one of the boundary lines of the Kohnyo Lode claim, as described in the amended survey thereof.

The request of claimant that the Fortuna claim be passed to patent on the entry and the Kohnyo claim be held in abeyance to be patented hereafter upon the same entry cannot be granted. There has been no decision or ruling of this office against the patenting of the claims together in the regular and proper way as applied for and entered, and the desire of the claimant to expedite action on the Fortuna claim is not sufficient reason for departure from the regular practice and rule of the office.

If the claimant so elects the entry will be canceled as to the Kohnyo claim and allowed to proceed as to the Fortuna, proceedings *de novo* could then be commenced for the Kohnyo, this is the uniform course in such cases.

The protest above mentioned is herewith returned that it may be used at the hearing, in case one should be had.

106 Notify parties in interest hereof, and in due time make report as required by the regulations.

Very respectfully,
 (Signed)

BINGER HERMANN,
 Commissioner.

M. E. McA. 24.

107

EXHIBIT J.

"N."

1899-89301-90335.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 31, 1899.

Register and receiver, Pueblo, Colorado.

SIRS: March 6, 1895, the Cripple Creek Gold Mining Company, made mineral entry No. 573 for the Kohnyo and Fortuna Lode claims, embraced in mineral survey No. 8612.

By decision of this office rendered May 28, 1895, said entry was held for cancellation as to the southerly portion of the Kohnyo Lode claim.

From said decision I quote: "Should this decision become final an amended survey will be required, establishing the southerly end line of the claim at the point where the lode intersects the placer claim."

A contest ensued.

In a decision rendered by this office July 15, 1898, it was stated that "in view of the foregoing said mineral entry is hereby canceled as to the Kohnyo claim except as to that portion of the ground lying easterly of line 25-26, survey No. 7407, for the Mt. Rosa patented placer.

"The claimant of the Kohnyo Lode claim will be allowed sixty days from due notice hereof within which to take the proper steps to have the amended survey made in accordance with the decision of May 28, 1895, and in case of default, said entry will be canceled in its entirety."

The surveyor-general of Colorado, with his letter of February 24, 1899, submitted the approved field notes and plat of an amended survey of said lode claim.

A careful examination of the original survey of, and the application for patent, for said lode claims discloses that the applicant applied for a lode or vein beginning at the discovery shaft of the Kohnyo claim, and running N. 20° 40' E., 70 feet, and S. 20° 40' W., 1319.9 feet.

Upon the plat of the amended survey the line of the Kohnyo lode or vein is described as beginning at the same discovery shaft, and running N. 7° 20' E., 67.51 feet, and S. 7° 20' W., 495.87 feet.

With your letter of March 7, 1899, you transmitted the protest of John McConaghy, against the approval and acceptance of the amended survey in this case.

The protestant alleged, in substance, that he is the owner of the Hypatia Lode claim which conflicts with the Kohnyo Lode claim

as described in the amended survey thereof; that in the amended survey the southerly end line is established at a point far south of that at which the Kohnyo vein intersects line 25-26 of the Mt. Rosa placer claim, and that the deputy mineral surveyor has attempted to mislead this office into the idea that the Kohnyo lode intersects the southerly end line as shown in the amended survey.

109 The protestant further alleged that his rights on the Hypatia Lode claim would be interfered with and destroyed by establishing the southerly end line as established by the amended survey.

By decision of this office dated April 27, 1899, the request for the issuance of a patent for the Fortuna Lode claim, leaving the Kohnyo claim to be subsequently disposed of, was denied, and the said protestant was allowed thirty days within which to apply for an order for a hearing to determine the true position and course of the Kohnyo vein.

An appeal was taken from the decision of April 27, 1899, and thereupon the honorable Secretary rendered a decision June 3, 1899 (28 L. D., 451), which see.

By the terms of said departmental decision, the Cripple Creek Gold Mining Company was allowed to have a patent issued for the Fortuna Lode claim, and the patent has accordingly been issued. As to the Kohnyo claim, the decision last mentioned allowed said company to commence proceedings for the reinstatement of said entry, and directed that further action on the appeal be deferred until the question of the reinstatement of the Kohnyo entry as to the southern portion of the Kohnyo location has been determined.

July 18, 1899, Messrs. Thayer & Rankin, the attorneys of record for said company filed with the honorable Secretary a withdrawal of the appeal from the decision of this office, dated April 27, 1899.

July 18, 1899, Messrs. Thayer and Rankin filed in this office a paper signed by them as attorneys for said company, and from said paper I quote: "In the matter of John McConaghy, protestant, *vs.* The Cripple Creek Gold Mining Company, Pueblo, Colorado, mineral entry No. 573, Kohnyo lode, we have the honor to enclose herewith a copy of our *withdrawal of appeal* from your decision "N" of April 27, 1899, which withdrawal we have this day filed with the honorable Secretary of the Interior. * * *

"Acting under instructions from the Cripple Creek Gold Mining Company we hereby waive all claims to right of reinstatement of the said southern portion of the Kohnyo location.

"In March last one John McConaghy, representing himself as the owner of the Hypatia Lode claim, filed a protest against the amended survey of the Kohnyo Lode claim, which was approved by the U. S. surveyor general February 24, 1899, and in your decision of April 27, 1899, you allowed the protestant thirty days within which to apply for a hearing on said protest.

"We are directed by our clients to waive all claims under said amended survey and to concede the course of the vein as given in

the original location and official survey, and we hereby make such waiver and concession.

"The purpose and effect of this waiver and concession is to eliminate the controversy with said protestant.

"We have now the honor to apply for a further amended survey of the north end of the Kohnyo, for the purpose of establishing the southerly end line at the point where the vein intersects the line of the patent Mount Rosa placer, relying upon the course of the vein as given in original location on official survey."

In view of the foregoing, the amended survey of the Kohnyo and Fortuna Lode claim, is hereby rejected and vacated, and 111 the order for a hearing contained in the decision of April 27, 1899, is now recalled, and McConaghy's said protest is dismissed, in view of the subsequent action taken.

You will notify the Cripple Creek Gold Mining Company that sixty days are allowed within which to file with the surveyor-general application for an amended survey in accordance with the decision of May 28, 1895, or to appeal, and that in case of default said entry will be canceled as to the Kohnyo Lode claim.

112

EXHIBIT K.

N.
E. C. F.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 29, 1900.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy, pages 1 to 5 inclusive, of office decision of July 15, 1898, in case of the Kohnyo Lode claim, mineral entry No. 573, Pueblo, Colorado, land district, is a true and literal exemplification of the record of said decision on file in this office.

[SEAL.] In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

BINGER HERMANN,
Commissioner of the General Land Office.

113

Ex. K.

N. DEPARTMENT OF THE INTERIOR, W. O. C. H. G. P.
C. A. B. GENERAL LAND OFFICE, J. V. W.
WASHINGTON, D. C., July 15, 1898.

Register and receiver, Pueblo, Colorado.

SIRS: The Kohnyo Lode claim, survey No. 8612, conflicts with the patented Mt. Rosa placer claim, survey No. 7407, as shown by the attached diagram delineated from the approved surveys.

March 6, 1895, the Cripple Creek Gold Mining Company made mineral entry No. 573 for the Kohnyo Lode claim exclusive of the conflict with said patented placer claim.

By said conflict and exclusion the Kohnyo Lode claim was divided into two non-contiguous tracts; the tract lying north of said placer containing the discovery shaft and improvements.

Upon the examination of said entry a decision was rendered May 28, 1895, from which I quote:

Under departmental decision dated February 23, 1893, in case of the Silver Queen lode, a lode claim intersected by a prior placer location, cannot be allowed to include ground not contiguous to that containing the discovery. See 16 L. D., 186.

The right to the Kohnyo lode, therefore, terminates where
114 it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts, and but one of said tracts can be embraced in the entry.

The complainant-company may, however, elect which of said tracts it desires to retain, the five hundred feet on the north or the southerly 700 feet. If the latter tract is retained, evidence of discovery of mineral thereon, and the statutory expenditure of \$500 must be submitted.

Claimant will be allowed sixty days in which to furnish required evidence or to appeal, in default of which the entry will be canceled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice from this office.

Upon the rendition of said decision the claimant of the Kohnyo Lode claim filed a petition to be allowed to include in its entry the ground in conflict with said placer claim, and upon said petition contest No. 1314, The Cripple Creek Gold Mining Company v. The Mt. Rosa Mining and Milling and Land Company ensued, which has been finally decided adversely to the Kohnyo claimant, and was closed by my letter of June 27, 1898.

June 14, 1898, the claimant of the Kohnyo claim filed in this office an instrument executed by the president of the Cripple Creek Gold Mining Company, in which he waived the right of review of the departmental decision in the contest referred to, and elected to retain in said entry that portion of the Kohnyo claim described as the five hundred feet on the north.

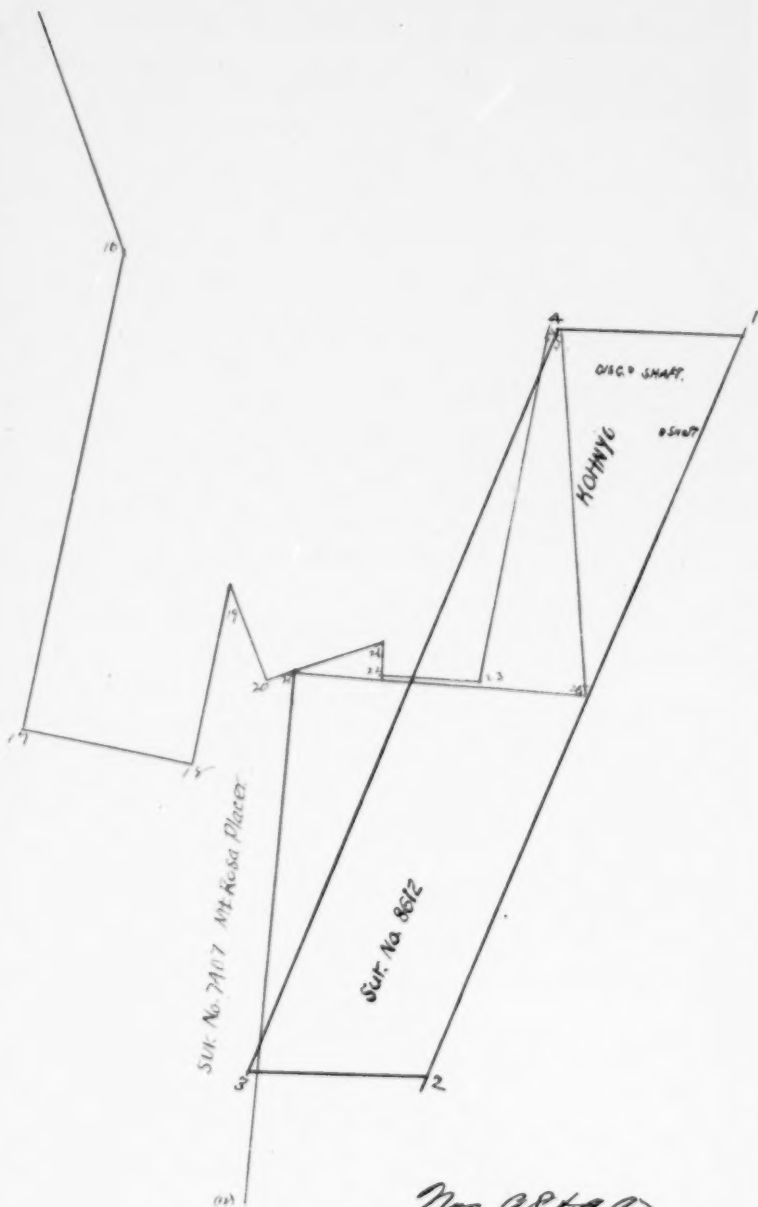
June 17, 1898, there was filed in this office a petition praying
115 that the petitioner be allowed to patent, under its present application, the two attached parts of the Kohnyo lode, for reasons substantially as follows:

1. That a well defined mineral bearing vein has been discovered and opened up in each end of the Kohnyo claim.

2. That affidavits now presented show that a conspiracy has been formed to prevent the petitioner from developing the southern end of its claim, so that it has not had a fair opportunity to prove which end of its claim it would prefer to vacate.

3. That the conspiracy is of such proportions as to effect the action of the police courts and justices of the peace to the extent that em-





No. 98499 }
 Small } p. 118
 Crown }

ployees of the petitioner have been arrested and thrown into jail and put under bonds for attempting to work upon ground covered by the receiver's receipt.

4. That the ground is of great value and that the parties desiring to secure the same are closely in touch with the Mt. Rosa Mining and Milling —, the Woods Investment Company and John McConaghy, who claim some interest in the ground.

There has also been filed the affidavit of Charles D. Gurney and W. G. Smith, which, in the main, support the averments contained in said petition.

June 17, 1898, there was received the protest of F. C. Brown, corroborated by John McConaghy, in which the protestant alleges, in effect, that he is the owner of the Scorpion Lode claim in conflict with the southerly portion of the Kohnyo claim; that at date of the Kohnyo entry no mineral had been discovered upon that portion of the claim lying south of the said patented placer claim and
116 that the Kohnyo improvements are situated upon the northerly portion of the claim. The protestant therefore, objects to the allowance of any discretion on the part of the Kohnyo claimant as to which of the two non-contiguous portions of the Kohnyo lode shall be canceled.

June 27, 1898, there was received at this office a protest by John McConaghy, corroborated by H. E. Woods and C. L. Arzens, in which the protestant alleged that the claim of the claimant of the Kohnyo claim was illegal as to all of the ground south and east and south and west of the point where said Kohnyo lode on its strike southwest from the discovery, intersects said patented placer claim, which ground he has embraced in his location of the Hypatia Lode claim.

In view of the fact that no motion for review of the departmental decision of May 7, 1898, affirming the decision rendered by this office May 28, 1895, was filed within the time prescribed by the rules of practice, the decision last mentioned became final and it now devolves upon this office to execute the same.

In view of the foregoing said mineral entry is hereby canceled as to the Kohnyo claim, except as to that portion of the ground lying easterly of line 25-26, survey No. 7407, for the Mt. Rosa patented placer claim.

The claimant of the Kohnyo Lode claim will be allowed sixty days from due notice hereof within which to take the proper steps to have the amended survey made in accordance with the decision of May 28, 1895, and in case of default, said entry will be canceled
117 in its entirety.

Notify parties interested, and at the proper time transmit evidence of service, together with all papers filed and your report. See circular approved October 28, 1886, 5 L. D., 204.

Very respectfully,

BINGER HERMANN,
Commissioner.

(B-13)

(Here follows diagram marked page 118.)

119 And thereafter and on the 16th day of September, A. D. 1901, the court rendered its findings in said cause, which were in favor of the defendant and against the plaintiff; to which findings of the court the plaintiff, by his counsel, then and there duly excepted.

And thereupon, and on the same day, the court entered judgment herein in favor of the defendant and against the plaintiff in accordance with the findings heretofore rendered herein; to which judgment, and to the entry thereof, the plaintiff, by his counsel, then and there duly excepted.

And thereupon, and on said day, the plaintiff herein prayed an appeal to the supreme court of the State of Colorado, which was allowed upon condition that the plaintiff file within 20 days from this date his appeal bond in the penal sum of \$250, with sureties to be approved by the clerk of this court; and time and until 60 days from this date is allowed the said plaintiff within which to prepare and tender his bill of exceptions by him reserved herein.

And thereafter and on the — day of — 1901, the plaintiff filed his appeal bond herein, which was then and there and on said day approved by the clerk of said court.

120 And now, forasmuch as the above and foregoing matters and things do not fully appear of record, the plaintiff tenders this, his bill of exceptions herein, and prays that the same may be signed and sealed by the judge of this court, and made a part of the record herein, pursuant to the statute in such case made and provided; which is accordingly done on this 21st day of December, A. D. 1901.

LOUIS W. CUNNINGHAM, [SEAL.]
Judge of the District Court of the Fourth
Judicial District of the State of Colorado.

Tendered to me on this 8th day of November, A. D. 1901.

LOUIS W. CUNNINGHAM, Judge.

O. K.

POTTER & MCCARTHY,
Attorney- for Defendant.

Endorsed: 128. Filed in the district court of Teller county, Colorado, Dec. 21, 1901. A. W. Grant, clerk.

Endorsed: 4449. Filed in supreme court Jan. 14 1902. Horace G. Clark, clerk.

121 Endorsed: No. 4449. In supreme court, State of Colorado. J. A. Small, appellant, vs. F. C. Brown, appellee. Transcript of record, bill of exceptions, and assignment of errors. Filed in supreme court this 14 day of Jan., 1902. H. G. Clark, clerk.

122

In the Supreme Court of the State of Colorado.

Pleas before the honorable the supreme court of the State of Colorado, sitting at Denver, in said State, at a term thereof begun and held at the capitol building, in said city, on the second Monday of April, A. D. 1904, and of the Independence of the United States the one hundred and twenty-eighth.

Present: Hon. William H. Gabbert, chief justice; Hon. Robert W. Steele, Hon. John Campbell, justices; Hon. Nathan C. Miller, attorney general; Hon. Felix A. Richardson, bailiff, and Horace G. Clark, clerk.

Be it remembered, that thereafter and on to-wit: the 6th day of June, A. D. 1904, the following judgment was entered of record in this court:

J. A. SMALL, Appellant,	} 4449. Appeal from the District Court of Teller County.
<i>vs.</i> F. C. BROWN, Appellee.	

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Teller as also upon the matters as-
 123 signed for error herein: and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is manifest error in the proceedings and judgment aforesaid of said district court,

It is therefore considered and adjudged by the court, that the judgment aforesaid of said district court be, and the same is hereby reversed, annulled, and altogether held for naught; and that the judgment of the court below be and is hereby vacated, and judgment entered in this court that neither party has established any right to the premises in controversy, and that each party pay his own costs in this court as well as in the court below. And let the opinion of the court filed herein be recorded.

123½	CHARLES DUNCAN GURNEY, Appellant,	} No. 4445.
	<i>v.</i> F. C. BROWN, Appellee.	
	J. A. SMALL, Appellant,	} No. 4449.
	<i>v.</i> F. C. BROWN, Appellee.	

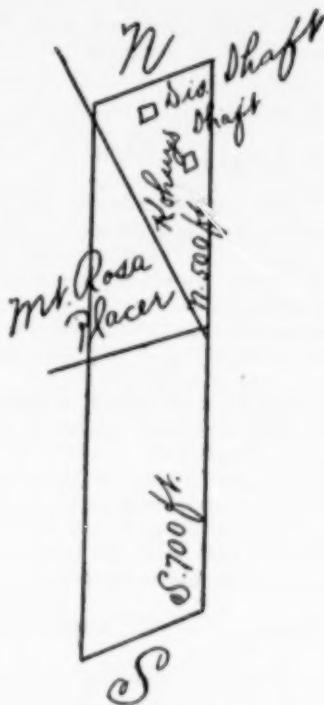
Appeals from the District Court of Teller County.

Chief Justice GABBERT delivered the opinion of the court:

The main question presented for determination in both of these causes is the same, and the mining premises in controversy embraces

practically the same tract. For these reasons the two cases will be disposed of in one opinion.

Appellee Brown applied for patent on a mining claim, known as the Scorpion. Appellant Gurney advised this application as the owner and claimant of the Hobson's Choice, and the appellant Small as the owner and claimant of the P. G. Thereafter each brought suit in support of his adverse claim. The causes were tried on an agreed statement of facts, whereby the main question presented is, when, with respect to the three locations, did the premises in controversy become subject to location? The following diagram will aid in understanding this question:



124 The facts presenting it are as follows:

From this diagram it will be observed that the Kohnyo was segregated into two disconnected tracts by the Mt. Rosa, a patented placer claim. The north end of the Kohnyo, approximately 500 feet in length, embraced the discovery shaft. The south end was some 700 feet in length, and was without development work of any kind. The local land office permitted the claimant of the

Kohnyo to enter the two tracts as one claim, but the Land Department ultimately refused to issue a patent for such tracts, basing such refusal upon the ground that two disconnected portions of a lode mining claim separated by a patented placer could not be included under one location, within the same patent. The land office, however, gave the applicant the privilege of proceeding to patent upon either of the segregated tracts, and directed that in default of an election or appeal by the claimant within sixty days from the date of the order, that the entry of that portion of the claim lying south of the Mt. Rosa placer should be cancelled without further notice. This decision was rendered May 28th, 1895. No appeal was taken from this decision, but the

125 claimant of the Kohnyo instituted proceedings against the claimants of the Mt. Rosa placer the purpose of which was to secure title to the vein of the Kohnyo, which, it was claimed, passed through the portion of the placer conflicting with the Kohnyo location. These proceedings were prosecuted before the Land Department, with the result that on May 7, 1898, a decision was rendered against the Kohnyo claimant's contention of a known vein in the placer conflict. June 14, 1898, the claimant of the Kohnyo filed in the local land office a written instrument, whereby election was made to retain and patent the north end of the Kohnyo claim, and in which the right to further question or review the decision of the Land Department of May 7, 1898, was waived. July 15, 1898, the Commissioner of the General Land Office cancelled the entry of the Kohnyo claim as to that portion south of the Mt. Rosa placer. May 13, 1898, appellee Brown located this 700 feet as the Scorpion Lode claim. June 23, 1898, appellant Gurney located the same premises as the Hobson's Choice lode, and July 16, 1898, appellant Small located the same ground as the P. and G. Lode claim. July 15th and 16th, 1898, the claimant of the Scorpion filed amended and second amended location certificates. On these facts judgment was rendered for defendant in each case, from which the plaintiffs appeal.

Other facts were stipulated, which have not been summarized because they are of that character, and cover such questions, that the rights of the respective claimants to the premises in controversy are wholly dependent upon the legal conclusions deducible from

126 those stated. Counsel for appellee, however, contend that the judgment must be affirmed because the agreed facts fail to identify the premises in dispute as part of the Kohnyo claim; do not establish the validity of that location, nor affirmatively show that the premises, when located as the Scorpion, were not part of the unappropriated public domain. The agreed statement will not bear this construction. It is evident from the record and the briefs of counsel, that the only question submitted for trial and the only one which the parties intended to litigate and have determined by the trial court was the time when the premises in controversy reverted to the public domain, and the judgment respecting their rights which would follow the conclusion of law on this question. Or, in other

words, the only question really submitted for trial was the point of time at which the premises in controversy were open to location. Upon the determination of this question the decision as to which of the respective locations was valid, depended. This is apparent from the agreed statement of facts, for thereby it was conceded that each of the parties litigant had complied with all the requirements of the law in the location of their respective claims, as set forth in their respective pleadings, saving and excepting it was not admitted that at the time of the respective locations the ground in controversy was subject to location. As to each claim this question was reserved for the decision of the trial court by the following proviso: "Provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain."

127 Counsel for appellee concede that the tract in controversy is substantially identical with the south tract of the Kohnyo lode, but say that such fact is not disclosed by the record. If not, it is rather strange that in the preparation of the agreed statement the various steps affecting the Kohnyo location were set out with such particularity. A discussion of the main question in the cases will demonstrate that the stipulated facts do establish the validity of the Kohnyo location, and that at the date of the location of the Scorpion the premises therein included were not a part of the unappropriated public domain. Appellee, however, is estopped from raising any of these questions now. His counsel state in their brief:

"Upon the trial in the court below the stipulation of facts was not read by either party. * * * It was upon taking up the record before this court for the preparation of appellee's brief that the question of the relevancy of the exhibits attached to the stipulation of facts first presented itself. * * * From an examination of the record it would appear to be a certainty that the case was tried in the lower court upon assumptions which are wholly unsupported by the written evidence contained in the agreed statement of facts. * * * The truth of the matter is, that after the preparation, execution and filing of the agreed facts, the stipulation containing such facts was never again read or digested by any of the parties in interest. The trial court and counsel for all the parties litigant assumed that the stipulation covered facts which, upon investigation, we fail to find."

128 Facts assumed to be true on the trial of a cause cannot afterwards be contested on appeal—2 Cyc., 675. In short, it appears that counsel for both sides, on the trial of the cause, construed the stipulated facts as covering these questions, and on appeal they will be held to that construction. Again, none of these questions were raised in the court below. Had they been, and the attention of the court and counsel been called to the fact that the agreed statement omitted material facts, opportunity would have been afforded to correct the alleged omissions either by further stipula-

tion or testimony. One of the cardinal principles of appellate procedure is, that questions sought to be reviewed shall first be brought before the trial court for decision. Otherwise, a court of review would often be compelled to decide purely original questions which the trial court was given no opportunity to decide or determine—Elliott's Appellate Procedure, § 489.

We shall next notice the contention of counsel for appellee, that the premises in controversy were not segregated by the Kohnyo location. In support of this claim, two propositions are relied upon: (1) The decision of the Land Department of May 7, 1898, to the effect that the Kohnyo vein was not known to exist within the boundaries of the Mt. Rosa placer at the time application for the patent therefor was made; and (2) that the rights of the Kohnyo claimant terminated at the point where the north end of the Kohnyo claim intersected the exterior boundaries of the Mt. Rosa placer. The first proposition is clearly untenable. The proceedings before

129 the Land Department with respect to the Kohnyo vein passing through the conflicting patented placer were for the purpose of determining whether or not such vein was known to exist at the time patent for the placer was applied for. On the evidence submitted the department held that it was not known when the claimants of the Mt. Rosa applied for a patent, and therefore could not be held by the Kohnyo lode. This is radically different from a judgment to the effect that the vein did not pass through the conflicting placer location. The second proposition is equally untenable. The Land Department is a special tribunal created for the purpose of supervising the various proceedings whereby title from the Government to portions of the public domain may be obtained. Its judgment respecting those matters which it must determine in ascertaining whether or not an applicant is entitled to acquire the fee title or patent from the United States is unassailable, except by direct proceedings. In other words, its judgment respecting those matters cannot be attacked collaterally.

Steele v. Smelting Co., 105 U. S., 447;

Smelting Co. v. Kemp, 104 U. S., 636.

In this instance the Land Department had determined that the applicant for patent on the Kohnyo was entitled to a conveyance of one or the other of the two tracts. Whether or not this conclusion was right or wrong cannot be questioned collaterally. If wrong, it was an error which the Land Department committed in the exercise of its jurisdiction over those matters specially entrusted to its supervision and control, and hence, could only be corrected in a direct proceeding instituted for that purpose.

130 & 131 This brings us to a discussion and determination of what we have designated as the main question, namely: At what date, with respect to the three locations now asserting rights to the premises in dispute, did such premises become subject to location?

No case is cited by counsel where the propositions presented by the facts narrated and bearing upon this question have been determined, and we must, therefore, analyze the facts and their effect for the purpose of ascertaining when, according to these facts, the subject matter of the actions reverted to the public domain. This is the important point, because a location of a mining claim can only be made upon unappropriated mineral land—*Armstrong v. Lower*, 6 Colo., 393. The decision of May 28, 1895, did not cancel the entry made by the applicant for patent on the Kohnyo. Thereby the Kohnyo claimant was given the right to elect which of the two tracts would be selected for patent. In case of failure to make such election, the Government reserved the right to cancel the entry on the south tract. The judgment of the Land Department was to be enforced in one of two ways, whereby one or the other of the tracts would be restored to the public domain, namely: by the election of the Kohnyo claimant, or the affirmative action of the department. The proceedings instituted by the Kohnyo claimant for the purpose of establishing the existence of a known vein through the Mt. Rosa placer at the time the patent for the latter was applied for cut no figure, for, independent of these proceedings, the fact remains that the judgment of the Land Department of May 28, 1895, was not enforced or given effect until the Kohnyo claimant, by its written declaration filed in the local land office indicated its intention to proceed to patent on the north tract. This act on the part of the Kohnyo claimant was an express surrender of all rights to the south tract. It operated as an abandonment of any right thereto, and took effect the very moment the declaration of election was filed in the local land office—*Derry v. Ross*, 5 Colo., 295. Up to that time the Land Department, having taken no affirmative action to cancel the Kohnyo entry on the south tract, the claimant might have selected that instead of the north one. Certainly, had such election been made, it could not be successfully claimed on the record before us, that the Scorpion could have established any rights against such selection. This conclusion is inevitable, because, so long as the Kohnyo claimant had rights in the south tract, it was not subject to location by third parties. If, then, this tract could not be located as against the rights of the Kohnyo claimant, an attempted location during the existence of such rights could be of no force or effect, because made at a time when it was not subject to location. The subsequent formal cancellation of the entry on the south tract by the action of the Land Department could add nothing to that which had already taken place by the action of the Kohnyo claimant in surrendering and abandoning all rights to the south tract. Such action on the part of the department only evidenced in another form the fact that the Kohnyo claimant had surrendered title to this tract so far as evidenced by the receiver's receipt, and that all rights thereunder were formally cancelled so far as the Government was concerned. This action, however, was not necessary in order to restore the south tract to the public domain, because, by the

judgment of the Land Department, that occurred the moment the Kohnyo claimant complied with that judgment. The action of the department in formally cancelling the entry of the south tract of the Kohnyo claim is only important in view of the fact that counsel for appellee contend that the judgment of May 28th, 1895, was self-executing, and that it did not appear from the agreed statement that the Kohnyo entry had not been cancelled in accordance with that judgment (or another, which we have not noticed because we do not deem it material) at the time of the Scorpion location. The Land Department certainly did not treat the judgment of May 28, 1895, as self-executing, because the Commissioner expressly stated, under date of July 15, 1898, that "it now devolves upon this office to execute the same." This action also established the fact that so far as any affirmative act of the Government was concerned, the south tract of the Kohnyo entry was not cancelled until the last mentioned date. It is therefore apparent that the contention of counsel for appellee, that the statement of facts does not establish the validity of the Kohnyo location, nor affirmatively show that on the date of the Scorpion location the premises so claimed were not subject to location, is not tenable, because the premises did not revert to the public domain until the Kohnyo claimant filed its election in the local land office, and up to that time the entry of the south tract of the Kohnyo had not been vacated by any affirmative act on the part of the Land Department. We must, therefore, conclude that the premises in controversy were not subject to location until after the date when the Kohnyo claimant filed in the local land office its election to patent the north tract. This being the conclusion, a brief summary of the facts will indicate which of the three claims constitutes a valid location of the south tract. The election of the Kohnyo claimant was filed in the local land office June 14, 1898. The Scorpion was attempted to be located May 13, 1898. June 23, 1898, the Hobson's Choice lode was located, and July 16th following the P. G. was located. It thus appears that the Scorpion was attempted to be located at a time when the premises were not subject to location; that the Hobson's Choice lode was located when they had reverted to the public domain, and that the location of the P. G. was made after that date; so that the only valid location was the Hobson's Choice.

Counsel for appellee have argued that the suspension of a receiver's receipt operates to render it incompetent as evidence of the validity of the claim upon which it is issued. This proposition may be correct, but the facts do not justify its application. The certificate on the Kohnyo was not suspended or cancelled, but the order of the department was to the effect that the entry itself should be suspended until certain directions were complied with. The mere suspension of a mineral entry for the purpose of requiring compliance with departmental regulations does not destroy the force of the certificate evidencing such entry, or enable third parties to attack its validity—§ 772, 2

Lindley on Mines; Last Chance M. Co. v. Tyler M. Co., 61 Fed., 557. Counsel for appellee, as we understand their brief, have also advanced the proposition that the judgment of the Land Department of May 28, 1895, not having been appealed from, operated to cancel the entry at the expiration of the date when the time allowed for appeal expired. We think this contention has already been answered, but the authorities they cite to support their claim are not in point. In *U. S. v. Steenerson*, 50 Fed., 504, as well as in *Murray v. Polglase*, 43 Pac. (Mon.), 505, it was held that according to the judgment of the Land Department, the respective entries had been cancelled; and so in the cases of *Reed*, 6 L. D., 563, *Gauger*, 10 L. D., 221, and *Perrott v. Connick*, 13 L. D., 598. As we have already shown, a judgment of absolute cancellation is entirely different from one where the entry is merely suspended for the purpose of enabling the applicant to comply with some specific requirement.

But one further matter requires notice, namely: The filing on the part of the Scorpion claimant of amended and second amended location certificates July 15 and 16, 1898, or, as it is claimed on behalf of his counsel, he made amended locations of his claim on these dates. These acts in no manner changed or enlarged his rights, for prior thereto, the premises had been claimed and located as the Hobson's Choice, at a time when the premises thereby included were open to location.

136 As these cases were tried in the court below on an agreed statement of facts, which definitely determines the rights of the respective parties, judgments in each case will be directed here under the authority of § 398 of the Civil Code. The judgment in *Small v. Brown* is vacated, and judgment will be entered in this court that neither party has established any right to the premises in controversy, and that each pay his own costs in this court as well as in the court below. In *Gurney v. Brown* it appears from the facts stipulated (considering those not specially noticed in the opinion), that the location of the Hobson's Choice is in all respects regular; that appellant Gurney is the owner of, and has established his right to the possession and occupancy of the premises embraced in, such location, and is entitled to recover the same from the appellee by virtue of a full compliance with the statutes of the United States and the State of Colorado in the discovery and location of the Hobson's Choice Lode mining claim. Wherefore, judgment is now here directed to be entered in this court that he do recover the premises included in the Hobson's Choice location of and from the appellee Brown, and that he also recover his costs in this court, as well as in the court below.

Judgments vacated and judgments entered in this court.

Endorsed: Filed in Supreme Court Jun- 6 1904. Horace G. Clark, clerk.

137 Be it remembered, that afterwards and on to-wit: the 20th day of June, A. D. 1904, the following order was entered of record in this office:

J. A. SMALL, Appellant, } 4449. Appeal from the District Court of
 vs. Teller County.
 F. C. BROWN, Appellee. }

At this day, upon consideration thereof, it is ordered by the court, that the motion of appellee herein, to extend the time for filing his petition for rehearing herein to June 23rd, 1904, be, and the same is hereby allowed.

138 In the Supreme Court of the State of Colorado.

J. A. SMALL, Appellant, }
 vs. No. 4449. Petition for Rehearing.
 F. C. BROWN, Appellee. }

Now comes the above named appellee, F. C. Brown, who prays the honorable court to grant a rehearing in this cause on the following grounds, to-wit:

First. This court erred in holding "that the rights of the Kohnyo claimant did not terminate at the point where the north end of the Kohnyo claim intersected the exterior boundaries of Mt. Rosa placer claim," because,

(a.) On May 28th, 1895, the Commissioner of the General Land Office rendered his decision, declaring expressly as follows: "The right to the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim, dividing the lode claim into two separate tracts."

(b.) Because, there is no provision of law, giving to lode claimant the right to include ground not contiguous to that containing its discovery, where the tract is intersected and cut in two by a patented placer claim.

(c.) Because, no discovery of mineral was ever made or attempted to be made by the Kohnyo claimant upon any part of their location, except the northerly tract, containing the original discovery and the premises in controversy in this suit were never segregated by the Kohnyo location.

Second. The court erred in holding that upon the record in this case, the Kohnyo claimant was entitled to a conveyance of the southerly tract which was separated from the discovery by the Mt. Rosa placer, because,

(a.) The Commissioner of the General Land Office, in his judgment of May 28th, 1895, after declaring that the right to the Kohnyo lode terminated where it intersected the placer and was, therefore, confined to the northerly tract, imposed conditions amounting to a

condition precedent, the fulfillment of which, within a stated period, would allow the claimant the right to select the southerly tract and patent same. The Commissioner says: "The claimant company may, however, elect which of said tracts it desires to retain, the five hundred feet on the north or the southerly seven hundred feet. If the latter tract is retained, evidence of discovery of mineral thereon and the statutory expenditure of five hundred (\$500.00) dollars must be submitted. Claimant will be allowed sixty (60) days in which to furnish required evidence or to appeal, in default of which the entry will be cancelled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice from this office."

(b.) The fact that the Kohnyo claimant was allowed the
140 privilege of complying with the mining laws with respect to the southerly tract and of furnishing evidence within sixty (60) days of the discovery of mineral thereon, and of the statutory expenditure of the five hundred (\$500.00) dollars to secure patent, did not give to said claimant any rights in said tract of land, nor reduce the southerly tract to the condition of occupied mineral land, it having been expressly decided, that the Kohnyo claimant had no rights whatever in that piece of ground and could have none until the conditions prescribed were strictly complied with.

(c.) The holding of this court makes the mere privilege of initiating right to possession through the compliance with the mining laws, tantamount to the ownership of the actual right itself.

(d.) The holding of this court establishes that the Kohnyo claimant was entitled to a right to the southern tract and the right to patent same without, in any way, complying with the judgment of the Land Office, expressly reciting the conditions upon which any rights could be secured.

Third. The court erred in holding that the decision of the Commissioner of the General Land Office, under date of May 28th, 1895, had not become operative at the time of the Scorpion location, because,

(a.) Said decision provided "claimant will be allowed sixty (60) days in which to furnish the required evidence or to appeal in default of which the entry will be cancelled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer
141 claim, without further notice from this office," and because, it is an admitted fact that the foregoing requirements in said decision were never complied with within the time specified, or at all.

(b.) The Kohnyo claimant could not comply with the conditions required by said decision, except in the specified manner stated, therefore, no rights of the Kohnyo claimant in or to said southerly tract, could arise out of the mere act of selection of said tract, regardless of the intervening time and the actions of others, but could only arise by a due appropriation of said tract in the discovery of mineral thereupon, as required by the mining laws, and by due com-

pliance with the terms of the decision in furnishing, within sixty (60) days, the necessary evidence required.

(c.) Because, a judgment rendered, as in this case, by the Land Department, holding an entry for cancellation, becomes operative from the time rendered, and the ground subject to location by another.

(d.) Because, the original judgment of the Land Office, under date of May 28th, 1895, has never been changed or qualified in any manner. The Kohnyo claimant did not, within the sixty (60) days, allowed by the judgment, or at any other time, furnish the required evidence of discovery of mineral or five hundred (\$500.00) dollars improvements on the southerly tract and never made selection of any ground except that which the judgment of May 28th, 1895, said they were entitled to.

142 (e.) Because, no selection having been made within the sixty (60) days, and no evidence having been furnished as required, the Kohnyo claimants lost whatever rights (if any) they ever had, in the southerly tract, by operation of law.

Fourth. The court erred in holding that the written declaration of the Kohnyo claimant, filed in some other proceeding, in which, said claimant states that it "waives the right of review of the last named decision and elects to retain in said M. E. No. 573, that portion of the Kohnyo lode claim which is described in the above mentioned letter of the Commissioner as the "five hundred (500) feet on the north," was an express surrender of all rights of said claimant to the south tract and operated as an abandonment of any right thereto, and took effect the very moment the declaration was filed in the local land office, because,

(a.) At the time said instrument was filed, the Kohnyo claimant had no rights in said south tract, for the reason that they had never complied with the judgment of the Land Department and had never furnished the required evidence of the performance of the conditions precedent, stated in said judgment.

(b.) Because, said so called selection was simply an acquiescence in the judgment of May 28th, 1895, declaring that "the right of the Kohnyo lode, therefore, terminates where it intersects and passes within the exterior boundaries of said patented placer claim."

(c.) Because, until mineral had been discovered on said southerly tract, the Kohnyo claimant had no rights therein which could be surrendered or abandoned.

143 (d.) Because, no affirmative action, aside from the judgment of May 28th, 1895, of the Land Department, was necessary to cancel the Kohnyo entry on the south tract and no self serving act of the claimant in deciding to patent the tract of ground containing his discovery shaft, could have the effect of restoring to the public domain, land in which he had no right or title.

Fifth. The court erred in holding that the Kohnyo claimant had any right whatsoever in the southerly tract at the time of the Scorpion location, because, (a) Under the departmental decision of

May 28th, 1895, it had been expressly established as the law, that the Kohnyo claimant had no right to grounds beyond the boundaries of the intersected Mt. Rosa placer claim, and, having no right to said ground at the date mentioned, the Kohnyo claimant could have none when the Scorpion lode was located, all conditions remaining the same at that date.

(b.) Because, no right whatsoever in said southerly tract, could ever be acquired by the Kohnyo claimant, except by the discovery of mineral thereupon as required by the mining laws.

(c.) Because, said claimant had wholly failed and refused to comply with the judgment of the Land Department, in allowing him to select said southerly tract within sixty (60) days' time, after May 28th, 1895, by making discovery of mineral and doing the five hundred (\$500.00) dollars' necessary patent work, and furnishing the required evidence of these facts, and only by complying with such conditions, could the Kohnyo claimant ever establish any right in said southerly tract.

144 Sixth. The court erred in holding that the southerly tract was only restored to the public domain by action of the Kohnyo claimant, in deciding to patent the northerly tract, which contained the original discovery, because,

(a.) Under the holding of the Commissioner of the General Land Office, before referred to, the Kohnyo claimant had no right, at any time, to the southerly tract.

(b.) After the judgment of May 28th, 1895, the southerly tract was, up to the time of the location of the Scorpion claim, unappropriated mineral land, and, upon the location of the Scorpion claim, was duly segregated.

(c.) Because, at the time the Kohnyo claimant made and filed his statement accepting the decision of the Land Department, which declared he had no right to the southerly tract, the ground in controversy had been duly located and appropriated by the Scorpion lode.

(d.) Because, the mere acquiescence upon the part of the claimant in the judgment of the Land Department, and no attempt upon his part to ever acquire the title to the southerly tract, does not operate as a restoration to the public domain of that to which the claimant never had any right or title.

Seventh. The court erred in holding that the judgment of the Commissioner of the General Land Office, under date of May 28th, 1895, did not amount to a cancellation, because,

(a.) The holding for cancellation is in law an equivalent of absolute cancellation.

145 (b.) The time within which the judgment was, by the terms, to be complied with, in the event claimant desired to secure title to the southerly tract, fully elapsed without such compliance being made or an appeal taken.

(c.) Because, no stay or supersedeas was had in reference to said

departmental decision lengthening or extending the time in which the conditions mentioned were to be complied with.

(d.) Because, claimant had the right of appeal to the Secretary of the Interior, which right was absolutely waived.

Eighth. The court erred in holding that the order of the department, of May 28th, 1895, was to the effect that the entry, itself, should be suspended, until certain directions were complied with, because,

(a.) It appears from such order or decision of the department, that the entry was not suspended, but cancelled to the extent of the southerly tract, without further notice provided the claimant did not appeal or furnish the required evidence within sixty (60) days.

(b.) Because, such order or decision of the department was not made for the purpose of requiring the compliance upon the part of the claimant with certain departmental regulations, but on the contrary, absolutely fixed and determined the rights of the claimant and gave him the usual time in which to appeal from the decision to the Secretary of the Interior.

Ninth. For the reasons above set forth and others which will appear in the argument and brief accompanying this petition, the court erred in holding that the ground in controversy was not subject to location at the time the appellee located his Scorpion lode.

Wherefore, because of the facts set forth herein, and because the decision of your honors, rendered in this case, completely wipes out and destroys what appellee believes to be valuable property rights, to which he is entitled, this petition is respectfully submitted, with the prayer that a rehearing be granted in this case.

CHARLES F. POTTER,
Attorney for F. C. Brown, Appellee.

Endorsed : No. 4449. In the supreme court of the State of Colorado. J. A. Small, appellant, v. F. C. Brown, appellee. Petition for rehearing. Filed in supreme court Jun- 23, 1904. Horace G. Clark, clerk.

147 In the Supreme Court of the State of Colorado.

J. A. SMALL, Appellant, } No. 4449. Appellant's Petition
v. } for Rehearing.
F. C. BROWN, Appellee. }

Now comes the above named appellant, J. A. Small, and prays the honorable court to grant a rehearing in this cause to said appellant for the following reasons:

First. The court erred in holding that the decision of May 28th, 1895, was only enforced and given effect by the written declaration of the Kohno claimant, known as "Exhibit H," and filed in the

local land office on June 14th, 1898, and in further holding that this act on the part of the Kohnyo claimant was an express surrender of all rights to the southern tract and operated as an abandonment of any right thereto, and took effect the moment such declaration of election was filed in the local land office, because,

(a.) The land having been entered by the Kohnyo claimant and the receiver's receipt issued, the southerly tract was segregated from the public domain and appropriated to private use and whether such segregation was valid or void, no affirmative act of the claimant in selecting the northerly tract, containing its discovery, could, in itself, enforce or give effect to the cancellation of the southerly tract, according to the terms of the judgment of May 28th, 1895.

(b.) Because, this act on the part of the Kohnyo claimant in no manner related to the southerly tract and it required the affirmative action of the Land Department to cancel the entry.

(c.) Because, this affirmative action was not had until the 15th day of July, 1898, when the Commissioner of the General Land Office rendered his decision, cancelling that part of the Kohnyo claim lying south of the Mt. Rosa placer, being the territory in controversy in this suit.

Second. The court erred in holding that the said southerly tract reverted to the public domain by the act of the Kohnyo claimant in filing said "Exhibit H." in the local land office, because,

(a.) At that time the territory in controversy was covered by the receiver's receipt issued for the Kohnyo claim, and the entry was not cancelled by action of the Land Department until July 15th, 1898, the day before appellant in this suit, located his "P. and G." Lode mining claim, covering the ground in controversy.

Third. The court erred in holding that the Hobson's Choice lode was located when the premises in controversy had reverted to the public domain and that the location of the "P. and G." lode was made after that date, so that the only valid location was the Hobson's Choice, because,

(a.) At the time the Hobson's Choice claim was located, the ground in controversy was segregated from the public domain, and appropriated to private use by the issuance of a receiver's receipt, and, whether such entry and the receipt evidencing same, were valid or void, no legal entry could be made on the premises in controversy by the owners of the Hobson's Choice claim, or any other person, before the Land Department had officially cancelled said entry and such cancellation had been noted on the books of the Department.

(b.) Because, the act of the Land Department, by which the premises in controversy reverted to the public domain, was the decision or judgment of the Commissioner, under date of July 15th, 1898, in which, after reviewing the previous action of the department, that part of the Kohnyo entry covering the premises in controversy was duly cancelled, the Commissioner decreeing as follows: "In view of the fact that no motion for review of the departmental decision of

May 7th, 1898, affirming the decision rendered by this office, May 28th, 1895, was filed within the time prescribed by the rules of practice, the decision last mentioned became final and it now devolves upon this office to execute the same.

"In view of the foregoing, said mineral entry is hereby cancelled as to the Kohnyo claim, except as to that portion of the ground lying easterly of line 25-26 survey No. 7407, for the Mt. Rosa patented placer claim."

(c) Because the "P. and G." Lode claim was the first and only location made upon the premises in controversy, after the foregoing judgment of the Land Department, under date of July 15th, 1898, and was the first and only claim located upon the premises in controversy after same had reverted to the public domain.

Respectfully submitted, JNO. KNOWLES,
Attorney for J. A. Small, Appellant,
302 Boston Building, Denver, Colo.

WILLIAM A. RINER, Of Counsel.

151 Endorsed: No. 4449. In the supreme court of the State of Colorado. J. A. Small, appellant, vs. F. C. Brown, appellee. Appellant's petition for rehearing. Filed in supreme court Jun-23, 1904. Horace G. Clark, clerk.

152 And afterwards and on to-wit: the 27th day of June, A. D. 1904, the following order was entered of record in this office:

J. A. SMALL, Appellant, } 4449. Appeal from the District Court of
vs. } Teller County.
F. C. BROWN, Appellee. }

At this day, upon consideration thereof, it is ordered by the court, that the petition of appellee for a rehearing herein be, and the same is hereby denied.

153 I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original transcript of record, bill of exceptions, assignment of errors, opinion of this court, petition for rehearing, and all orders of court entered herein, as the same now remain on file and of record in this office.

Witness my hand and seal of said court, affixed at my office, in the city of Denver, this 12th day of Aug., A. D. 1904.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK, Clerk,
By JOHN B. COOKE, Deputy.

JOSIAH APPLETON SMALL, Heretofore Designated as J. A. Small, Plaintiff in Error,	} No. —. Error to the Supreme Court of the State of Colorado.
vs.	
FRANK COLE BROWN, Heretofore Designated as F. C. Brown, Defendant in Error.	

Comes now the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause, the supreme court of the State of Colorado erred to the grievous injury and wrong of the plaintiff herein, and to the prejudice, and against the rights of the plaintiff in error in the following particulars, to-wit:—

(1.) The said supreme court erred in holding that, under the agreed statement of facts in this case, and the statutes and laws of the United States relating to the control and disposition of its public mineral lands, by the Department of the Interior, plaintiff in error had not established any right to the premises in controversy, and was not entitled to judgment.

(2.) The said supreme court erred in holding that the decision of May 28, 1895, of the Land Department of the Government of the United States, holding the entry of the Kohnyo claim for cancellation to the extent of the southerly seven hundred (700) feet, was of no force or effect, except as same became operative by the written declaration known as "Exhibit H," and filed in the local land office June 14, 1898.

(3.) The said supreme court erred in holding that under the judgment of May 28, 1895, and the statutes and laws of the United States relative to the sale and disposition of its mineral lands by the said Land Department, the southerly seven hundred (700) feet of the Kohnyo lode became a part of the public mineral domain on June 14, 1898, by some affirmative act of the claimant.

(4.) The said supreme court erred in not giving due force and effect to the statutes and laws of the United States relating to the sale and disposition of its public mineral domain, and to the decision of the Land Department, and in not holding that the receiver's receipt, issued for the Kohnyo lode, and covering the premises in controversy in this suit, segregated same from the public domain, and that such premises remained so segregated until the 15th day of July, 1898, when the Land Department rendered its decision cancelling the entry upon that part of the Kohnyo claim lying south of the Mt. Rosa placer.

(5.) The said supreme court erred in not giving due force and effect to the judgment of the Land Department, under date of the 15th day of July, 1898, cancelling the entry of the Kohnyo claimant, in so far as the receiver's receipt covering the premises in controversy in this suit; and in holding that said judgment of cancel-

lation was of no force or effect, and was not conclusive and binding upon said court.

(6.) The said supreme court erred in holding that, at the time the Hobson's Choice lode was located, the premises in controversy had reverted to the public domain.

(7.) The said court erred in not holding that, under the statutes and laws of the United States relating to the sale and disposition of the public mineral domain, and the judgments of the Land Department, appearing in the record of the case, the premises in controversy ceased to be a part of the public domain, upon the issuance of a receiver's receipt, and did not revert to the public domain until the judgment of the Land Department of July 15, 1898, which judgment cancelled the mineral entry of that part of the
156 Kohnyo claim covering the premises in controversy in this suit.

(8.) The said supreme court erred in holding that the act on the part of the Kohnyo claimant in filing a written declaration known as "Exhibit H" in the Land Office was, in and by itself alone, the means whereby the ground in controversy in this suit, became public domain.

(9.) The said supreme court erred in holding that, under the judgment of the Land Department of May 28, 1895, and the subsequent judgment of July 15, 1898, the rights of the parties to this litigation must be determined solely by the act of filing said written declaration of June 14, 1898, known as "Exhibit H."

(10.) The said supreme court erred in holding that the judgment of the Land Department of the Government, under date of May 28, 1895, holding the entry upon the premises in controversy in this suit for cancellation, and the subsequent judgment of July 15, 1898, cancelling said entry, were not binding upon said court and were without force or effect except as same became operative by some affirmative action of the claimant.

(11.) The said supreme court erred in holding that the premises in controversy in this suit reverted to the public domain, and became a part of the public domain on June 14, 1898.

(12.) The said supreme court erred in determining the rights of the plaintiff in error herein, under and by virtue of a claim of title set up by one who is not a party to this suit.

(13.) The said supreme court erred in holding that, under the statutes and laws of the United States relating to its mineral lands, and the control, sale and disposition of same by the Department of the Interior, the premises in controversy in this suit was not public mineral domain and subject to location by plaintiff in error on July 16, 1898, the day after the judgment of cancellation was rendered and became operative, cancelling the entry of the
Kohnyo claimant upon said premises.

157 (14.) The said supreme court erred in not reversing the judgment of the trial court, and in not giving to plaintiff in error his rights under the statutes and laws of the United States,

as the first legal locator and appropriator of the mineral premises in controversy in this suit.

Wherefore, for these and other manifest errors appearing in the record, the said Josiah Appleton Small, plaintiff in error, prays that the judgment of the said supreme court of Colorado be reversed and set aside, and held for naught, and that judgment be rendered for plaintiff in error, granting him his rights under the statutes and laws of the United States, and plaintiff in error, also prays judgment for his costs.

HUBERT HOWSON,
38 Park Row, New York City,
JOHN KNOWLES,
Colorado Sp'gs, Colo.,

Attorneys for Josiah Appleton Small, Plaintiff in Error.

157½ [Endorsed :] No. —. In the Supreme Court of the United States. Josiah Appleton Small, heretofore designated as J. A. Small, plaintiff in error, vs. Frank Cole Brown, heretofore designated as F. C. Brown, defendant in error. Assignments of error. Filed in supreme court, Aug. 5, 1904 Horace G. Clark, clerk.

158 In the Supreme Court of the United States.

FRANK COLE BROWN, Heretofore Designated as F. C. Brown, Plaintiff in Error,	} No. —. Error to the Supreme Court of the State of Colorado.
vs.	
JOSIAH APPLETON SMALL, Heretofore Designated as J. A. Small, Defendant in Error.	}

Comes now the plaintiff in error in the above entitled cause and avers and shows that in the record and proceedings in said cause, the supreme court of the State of Colorado erred to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice, and against the rights of the plaintiff in error in the following particulars, to-wit :—

(1.) The said supreme court erred in over-ruling and setting aside the judgment of the trial court, because, under the agreed statement of facts, and the laws of the United States relating to the control and disposition of its public mineral lands by the Department of the Interior, plaintiff in error was entitled to his judgment.

(2.) The said supreme court erred in holding that under the agreed statement of facts, and the laws of the United States relating to the control and disposition of public mineral lands by the Department of the Interior, the plaintiff in error had not established any right to the premises in controversy.

(3.) The said supreme court erred in not giving due force and effect to the decision of the Land Department of the Government of the United States, to-wit :—the decision of the Commissioner of the

General Land Office, dated May 28, 1895, which expressly declared that the right to the lode terminated where it intersected and passed within the exterior boundaries of the patented placer claim, which placer claim divided the lode claim into two separate and distinct tracts.

(4.) The said supreme court erred in construing and determining the decision of the Land Department of the Government of the United States, to-wit:—the decision of May 28, 1895, and the statutes and laws of the United States relating to the sale and disposition of its mineral lands by the said Land Department, in such a manner as to hold that the southerly seven hundred (700) feet of the lode location in question, was a part of the Kohnyo claim, until June 14, 1898, and that the judgment of cancellation of May 28, 1895, did not become operative prior to June 14, 1898, and that said judgment of cancellation was not conclusive and binding upon the supreme court of Colorado.

(5.) The said supreme court erred in holding that under the decision of the General Land Office of date, May 28, 1895, and the statutes and laws of the United States relating to the sale and disposition of its mineral lands, the lode claimant ever had or could have any right, title or interest in the southerly seven hundred (700) feet of the Kohnyo claim, or right to enter same for patent, without first making a discovery of mineral thereupon, and making proof of such discovery to the Land Department, together with proof of the statutory expenditure of five hundred (\$500.00) dollars for the purpose of obtaining patent.

(6.) The said supreme court erred in holding that, upon the record in this case, the Kohnyo claimant was entitled to a conveyance of the said southerly tract, or to enter same in the United States Land Office for patent.

(7.) The said supreme court erred in not holding that under the judgment of the Land Department of May 28, 1895, the interest of the claimant in the said southerly tract—the premises in controversy in this suit—depended entirely upon the performance of conditions precedent, to-wit:—the discovery of mineral and the performance of five hundred (\$500.00) dollars patent labor, and the failure to perform the conditions within the stated time, lost to claimant the right of selection mentioned in such judgment.

(8.) The said supreme court erred in not giving due and proper effect and consideration to the decision of the Department of the Interior, of May 28, 1895, which held that a lode claim, intersected by a patented placer, cannot be allowed to include ground not contiguous to that containing the discovery, and that the right to the lode claim in question, terminated where it intersected and passed within the exterior boundaries of the patented placer claim; and erred, in not holding that such judgment and decision was binding upon the supreme court of Colorado.

(9.) The said supreme court erred, in holding that the judgment

of the Land Department, of May 28, 1895, was without force or effect until the Kohnyo claimant, by its written declaration, filed in the local land office, indicated its intention to patent the *north tract*, which had always been recognized as valid and which contained the discovery workings of the claim.

(10.) The said supreme court erred, in holding that the act on the part of the Kohnyo claimant in filing the written declaration known as "Exhibit H" in the Land Office, was in and by itself alone, the means of determining—under the judgment of the Land Department of May 28, 1895—when the ground in controversy in this suit became public domain. And in holding that the rights of the parties to this litigation must be determined solely by the act of filing said written declaration of June 14, 1898, and not by the judgment of the Land Department.

(11.) The said supreme court erred in holding that, under the statutes and laws governing the sale and disposition of the public mineral domain, and the control and power of the Department of the Interior over same, the judgment of the Land Department
160 of May 28, 1895, was not, and could not be the means of cancelling the Kohnyo entry upon the premises in controversy, until the said Kohnyo claimant filed in the local land office, the instrument known as "Exhibit H;" and in virtually holding that said judgment was without force or effect until more than three years after it was rendered.

(12.) The said supreme court erred in holding that the premises in controversy in this suit, did not revert to the public domain, and was not a part of the public domain until June 14, 1898, when the Kohnyo claimant filed "Exhibit H" in the local land office.

(13.) The said supreme court erred in holding that the said decision of the Land Department, of May 28, 1895, was not a judgment of cancellation, as to the premises in controversy in this suit.

(14.) The said supreme court erred in holding that the judgment of May 28, 1895 of the Land Department of the Government did not—as to the premises in controversy in this suit—become final sixty (60) days after same was rendered, and thereupon, become conclusive and binding upon the Kohnyo claimant and upon the courts.

(15.) The said supreme court erred in holding, that the judgment of the Land Department of May 28, 1895, which allowed the claimant sixty (60) days in which to furnish the required evidence, or to appeal—in default of which, the entry would be cancelled to the extent of the premises in controversy—did not become a final judgment upon the failure of the claimant to either appeal or furnish the evidence required; and in holding that, under the said judgment, the land did not—at the end of sixty (60) days' time (there being no appeal or proofs furnished)—become subject to location and entry by
the first legal applicant.

161 (16.) The said supreme court erred in holding that, under the statutes and laws of the United States relating to its mineral lands, and the control, sale and disposition of same by the De-

partment of the Interior, the premises in controversy *was* not public mineral domain, and subject to location by plaintiff in error, on May 13, 1898, when he located his Scorpion Lode claim.

(17.) The said supreme court erred in not affirming the judgment of the trial court, giving to plaintiff in error, his rights under the statutes and laws of the United States, as the first legal locator and applicant for the mineral premises in controversy.

Wherefore, for these and other manifest errors which appear in the record in this case, said Frank Cole Brown, plaintiff in error, prays that the judgment of the said supreme court of Colorado be reversed and set aside, and held for naught, and that the judgment of the trial court be affirmed and reinstated, giving and granting to the plaintiff in error, his rights under the statutes and laws of the United States; plaintiff in error, also, prays judgment for his costs.

CHARLES F. CONSAUL,

Bond Building, Washington, D. C.,

CHARLES F. POTTER,

302 Boston Bldg., Denver, Colo.,

Attorneys for Frank Cole Brown, Plaintiff in Error.

161½ [Endorsed:] No. —. In the Supreme Court of the United States. Frank Cole Brown, heretofore designated as F. C. Brown, plaintiff in error, vs. Josiah Appleton Small, heretofore designated as J. A. Small, defendant in error. Assignments of error. Filed in supreme court Aug. 8, 1904. Horace G. Clark, clerk.

162 In the Supreme Court of the State of Colorado.

J. A. SMALL, Appellant,

vs.

F. C. BROWN, Appellee.

} No. 4449. Petition for Writ of Error.

Comes now the above named F. C. Brown, appellee, and says: That on the 6th day of June, A. D. 1904, judgment in this case was entered by this court against F. C. Brown, appellee, and thereafter a petition for rehearing was filed, presented, considered, and on the 27th day of June, A. D. 1904, denied by this court, whereupon said judgment became final; that said F. C. Brown was, and is aggrieved in, that, in said judgment and the proceedings had prior thereto in this case, certain errors were committed to his prejudice; that this is an action brought under the statutes of the United States, relating to the mineral lands of the United States, and the control of same by the Department of the Interior, and the sale and patenting of same to the citizens of the United States, and under and by virtue of said statutes, the said F. C. Brown, claim- title to and the right to patent certain mineral lands in the State of Colorado, and that by this action, there was drawn in question, the construction of certain of said statutes and the decision of this court is against said title

and right claimed by the said F. C. Brown, appellee, and, as he believes, contrary to the statutes of the United States, relating to the sale and disposition of its mineral lands and against the title and right of said F. C. Brown, thereunder, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, said F. C. Brown prays that a writ of error may issue to the supreme court of the State of Colorado for the correcting of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein, may be sent to the United States Supreme Court.

CHARLES F. CONSAUL,
CHARLES F. POTTER,
Attorneys for F. C. Brown.

163 In the Supreme Court of the State of Colorado.

J. A. SMALL, Appellant,	} No. 4449. Allowance of Writ of Error.
vs.	
F. C. BROWN, Appellee.	

Comes now F. C. Brown, the appellee above named, on this fifth day of July, A. D. 1904, and files and presents to this court, his petition, praying for the allowance of a writ of error intended to be urged by him; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States, the questions therein presented, it is ordered by this court that a writ of error be allowed, as prayed, provided, however, that said F. C. Brown, appellee, give bond according to law in the sum of two thousand (2000) dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 5th day of July, A. D. 1904.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court
of the State of Colorado.

[Endorsed:] No. 4449. In the supreme court of the State of Colorado. J. A. Small, appellant, vs. F. C. Brown, appellee. Petition for writ of error and allowance of same. Filed in supreme court, Jul- 6, 1904. Horace G. Clark, clerk. Charles F. Potter, attorney. 302 Boston building, Denver, Colo.

164 In the Supreme Court of the State of Colorado.

J. A. SMALL, Appellant, }
 vs. } No. 4449. Petition for Writ of Error.
 F. C. BROWN, Appellee. }

Comes now the above named J. A. Small, appellant, and says; that on the 6th day of June, A. D. 1904, judgment in this case was entered by this court against J. A. Small, appellant, and thereafter, a petition for rehearing was filed, presented, considered, and on the 27th day of June, A. D. 1904, denied by this court, whereupon said judgment became final; that said J. A. Small was, and is aggrieved in, that, in said judgment and the proceedings had prior thereto in this case, certain errors were committed to his prejudice; that this is an action brought under the statutes of the United States, relating to the mineral lands of the United States, and the control of same by the Department of the Interior, and the sale and patenting of same to citizens of the United States, and under and by virtue of said statutes, the said J. A. Small, claims title to and the right to patent certain mineral lands in the State of Colorado, and that by this action, there was drawn in question, the construction of certain of said statutes and the decision of this court is against said title and right claimed by the said J. A. Small, appellant, and as he believes, contrary to the statutes of the United States, relating to the sale and disposition of its mineral lands and against the title and right of said J. A. Small, thereunder, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, said J. A. Small prays that a writ of error may issue to the supreme court of the State of Colorado for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein, may be sent to the United States Supreme Court.

HERBERT HOWSON,
 JOHN KNOWLES,
 Attorneys for J. A. Small.

165 In the Supreme Court of the State of Colorado.

J. A. SMALL, Appellant, }
 vs. } No. 4449. Allowance of Writ of Error.
 F. C. BROWN, Appellee. }

Comes now the appellant, J. A. Small, above named, on this fifth day of July, A. D. 1904, and filed and presents to this court, his petition, praying for the allowance of a writ of error intended to be urged by him; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judg-

ment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States, the questions therein presented, it is ordered by this court that a writ of error be allowed, as prayed, provided, however, that said J. A. Small, appellant give bond according to law in the sum of two thousand (2000) dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 5th day of July, A. D. 1904.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court
of the State of Colorado.

165½ [Endorsed:] No. 4449. In the supreme court of the State of Colorado. J. A. Small, appellant, vs. F. C. Brown, appellee. Petition for writ of error and allowance of same. Filed in supreme court, Jul- 6 1904 Horace G. Clark, clerk.

166 In the Supreme Court of the United States.

FRANK COLE BROWN, Heretofore Designated as F. C. Brown, Plaintiff in Error, vs. JOSIAH APPLETON SMALL, Heretofore Designated as J. A. Small, Defendant in Error.	}	Bond for Security upon Writ of Error.
--	---	--

Know all men by these presents: That we, Frank Cole Brown, of the county of Pueblo, State of Colorado, as principal, and Frank Milo Woods, of the county of El Paso, and J. B. Cunningham, of the county of Teller, State of Colorado, as sureties, are held and firmly bound unto the above named Josiah Appleton Small, in the sum of two thousand (\$2000.00) dollars, to be paid to him and for the payment of which, well and truly to be made, we bind ourselves, and each of us, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the thirtieth day of July, in the year of our Lord one thousand nine hundred and four.

Whereas, the above named Frank Cole Brown, plaintiff in error, seeks to prosecute his writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the State of Colorado,

Now therefore, the condition of this obligation is such that if the

167 above named plaintiff in error shall prosecute his writ of error to effect and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and virtue.

FRANK COLE BROWN. [SEAL.]
FRANK MILO WOODS. [SEAL.]
J. B. CUNNINGHAM. [SEAL.]

STATE OF COLORADO, }
County of El Paso, } ss :

Frank Milo Woods and J. B. Cunningham, whose names are subscribed as surety to the above bond, being severally and duly sworn, each for himself says, that he is a resident and freeholder of the State of Colorado, and is worth more than the sum in said bond specified as the penalty thereof, over and above all his just debts and liabilities, in property not by law exempt from execution in this State.

FRANK MILO WOODS.
J. B. CUNNINGHAM.

Subscribed and sworn to before me, this fourth day of August, A. D. 1904. My commission expires January 2, 1906.

FREDERICK E. BROWNE,
Notary Public.

168 This bond approved this 8th day of August, A. D. 1904.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court of
the State of Colorado.

Endorsed : No. — In the Supreme Court of the United States. Frank Cole Brown, heretofore designated as F. C. Brown, plaintiff in error, vs. Josiah Appleton Small, heretofore designated as J. A. Small, defendant in error. Bond. Filed in supreme court Aug. 8 1904. Horace G. Clark, clerk.

169 The original of the foregoing supersedeas bond was lodged with the clerk of the supreme court of the State of Colorado on the fifth day of August, A. D. 1904, and the following indorsement made thereon :

Bond. Filed, August 5, 1904.—Horace G. Clark, clerk supreme court.

170 In the Supreme Court of the United States.

JOSIAH APPLETON SMALL, Heretofore Designated as J. A. Small, Plaintiff in Error,

vs.

FRANK COLE BROWN, Heretofore Designated as F. C. Brown, Defendant in Error.

Bond for Security upon Writ of Error.

Know all men by these presents, that we, Josiah Appleton Small, of the county of Pueblo, State of Colorado, as principal, and Kate M. Woods, Harry Edwin Woods and Roselpha Green, of the county of El Paso, State of Colorado, as sureties, are held and firmly bound unto the above named Frank Cole Brown, in the sum of two thousand (\$2000.00) dollars, to be paid to the said Frank Cole Brown, and for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the thirtieth day of July, in the year of our Lord one thousand nine hundred and four.

Whereas, the above named Josiah Appleton Small, plaintiff in error, seeks to prosecute his writ of error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the supreme court of the State of Colorado.

Now therefore, the condition of this obligation is such that
171 if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void, otherwise, to remain in full force and virtue.

J. A. SMALL.

JOSIAH APPLETON SMALL.

ROSELPHA GREEN.

KATE M. WOODS.

HARRY EDWIN WOODS.

[SEAL.]

[SEAL.]

[SEAL.]

[SEAL.]

[SEAL.]

STATE OF COLORADO, }
County of El Paso, } ss:

Harry Edwin Woods, whose name is subscribed as surety to the above bond, being first duly sworn, says, that he is a resident and freeholder of the State of Colorado, and is worth more than the sum in said bond specified as the penalty thereof, over and above all his just debts and liabilities, in property not by law exempt from execution in this State.

HARRY EDWIN WOODS.

Subscribed and sworn to before me, this 2nd day of August, A. D. 1904.

My commission expires Oct. 11" 1907.

LINUS E. SHERMAN,
Notary Public.

172 STATE OF COLORADO, } ss:
County of El Paso, }

Kate M. Woods and Roselpha Green, whose names are subscribed as surety to the above bond, being severally and duly sworn, each for herself, says that she is a resident and freeholder of the State of Colorado, and is worth the sum in said bond specified as the penalty thereof, over and above all her just debts and liabilities in property not by law exempt from execution in this State.

ROSELPHA GREEN.
KATE M. WOODS.

Subscribed and sworn to before me, this thirtieth day of July, A. D. 1904.

My commission expires December 31, 1906.

MARY L. RICHARDSON,
Notary Public.

This bond approved this fourth day of August, A. D. 1904.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court
of the State of Colorado.

Endorsed: No. —. In the Supreme Court of the United States. Josiah Appleton Small, heretofore designated as J. A. Small, plaintiff in error, vs. Frank Cole Brown, heretofore designated as F. C. Brown, defendant in error. Bond. Filed in supreme court Aug. 5, 1904. Horace G. Clark, clerk.

173 The original of the foregoing supersedeas bond was lodged with the clerk of the supreme court of the State of Colorado on the fifth day of August, A. D. 1904, and the following indorsement made thereon:

Bond. Filed, August 5, 1904.—Horace G. Clark, clerk supreme court.

174 Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the justices of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Colorado, before you, at the June sitting of the April term 1904 thereof, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between

Josiah Appleton Small designated as J. A. Small plaintiff and appellant, and Frank Cole Brown designated as F. C. Brown defendant and appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity or wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Josiah Appleton Small as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifth day of August, in the year of our Lord one thousand nine hundred and four.

Done in the city and county of Denver, with the seal of the circuit court of the United States for the district of Colorado attached.

[Seal United States Circuit Court, District of Colorado.]

ROBERT BAILEY,

Clerk of the Circuit Court of the United States,
District of Colorado.

Allowed by

WILLIAM H. GABBERT,

Chief Justice of the Supreme Court of the
State of Colorado.

174½ [Endorsed:] No. —. In the Supreme Court of the United States. Josiah Appleton Small, plaintiff in error, vs. Frank Cole Brown, defendant in error. Writ of error to the supreme court of the State of Colorado. Filed this — day of August, 1904. —, clerk of supreme court. Filed in supreme court, Aug. 5, 1904. Horace G. Clark, clerk.

175 The original of the foregoing writ of error was lodged with the clerk of the supreme court of the State of Colorado on August fifth, A. D. 1904, and also at the same time and place, a copy thereof for the defendant, Josiah Appleton Small said copy being addressed personally to said defendant. The following indorsement was made upon the said original writ and upon each copy:

Writ of error. Filed, August 5, A. D. 1904. Horace G. Clark, clerk.

176

Writ of Error.

UNITED STATES OF AMERICA, ss :

The President of the United States to the honorable the justices of the supreme court of the State of Colorado, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Colorado, before you, at the June sitting of the April term 1904 thereof, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between Josiah Appleton Small, heretofore designated as J. A. Small, plaintiff and appellant, and Frank Cole Brown designated as F. C. Brown defendant and appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity ; or wherein was drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision was against their validity ; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission ; a manifest error hath happened to the great damage of the said Frank Cole Brown as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of August, in the year of our Lord one thousand nine hundred and four.

Done in the city and county of Denver, with the seal of the circuit court of the United States for the district of Colorado attached.

[Seal United States Circuit Court, District of Colorado.]

ROBERT BAILEY,
Clerk of the Circuit Court of the United States,
District of Colorado.

Allowed by

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court
of the State of Colorado.

176½ [Endorsed:] No. —. In the Supreme Court of the United States. Frank Cole Brown, heretofore designated as F. C. Brown, plaintiff in error, vs. Josiah Appleton Small, heretofore designated as J. A. Small, defendant in error. Writ of error. Filed in supreme court, Aug. 8, 1904. Horace G. Clark, clerk.

177 The original of the foregoing writ of error was lodged with the clerk of the supreme court of the State of Colorado on August fifth, A. D. 1904, and also at the same time and place, a copy thereof for the defendant, Frank Cole Brown, said copy being addressed personally to said defendant. The following indorsement was made upon the said original writ and upon each copy:

Writ of error. Filed, August 8, A. D. 1904. Horace G. Clark, clerk supreme court.

178 Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to Frank Cole Brown, designated as F. C. Brown, Colorado, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Colorado, wherein Josiah Appleton Small, designated as J. A. Small, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the supreme court of the State of Colorado, this fifth day of August, 1904.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court
of the State of Colorado.

Attest:

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court
of the State of Colorado.

CITY AND COUNTY OF DENVER, }
State of Colorado. }

AUGUST 5TH, 1904.

I, the undersigned attorney- of record for the defendant in error of the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

CHARLES F. CONSAUL,
Bond Building, Washington, D. C.,
CHARLES F. POTTER,
Boston Bldg., Denver, Colo.,
Attorneys for Frank Cole Brown.

179 [Endorsed:] No. — In the Supreme Court of the United States. Josiah Appleton Small, plaintiff in error, vs. Frank Cole Brown, defendant in error. Citation. Filed this — day of August, 1904. — — —, clerk supreme court. Filed in supreme court, Aug. 13, 1904 Horace G. Clark, clerk.

180

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to Josiah Appleton Small, designated as J. A. Small, Colorado, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Colorado, wherein Frank Cole Brown, designated as F. C. Brown, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and, why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the supreme court of the State of Colorado, this 8th day of August, 1904.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court
of the State of Colorado.

Attest :

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court
of the State of Colorado.

CITY AND COUNTY OF DENVER, }
State of Colorado.

AUGUST 8TH, 1904.

I, the undersigned attorney- of record for the defendant in error of the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

HERBERT HOWSON,
38 Park Row, New York City, &
JOHN KNOWLES,
Colorado Springs, Colo.,
Attorneys for Josiah Appleton Small.

181 [Endorsed:] No. —. In the Supreme Court of the United States. Frank Cole Brown, heretofore designated as F. C. Brown, plaintiff in error, vs. Josiah Appleton Small, heretofore designated as J. A. Small, defendant in error. Citation. Filed in supreme court, Aug. 13, 1904. Horace G. Clark, clerk.

182 Return to Writ.

UNITED STATES OF AMERICA, }
Supreme Court of Colorado, } ss :

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said supreme court, in the city and county of Denver, this 20th day of August, A. D. 1904.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado,
By JOHN B. COOKE, Deputy.

Costs of Suit.

Plaintiff's costs, —, paid by Frank Cole Brown.

Defendant's costs, —, paid by Josiah Appleton Small.

Costs of transcript, \$44.00, one-half paid by Josiah Appleton Small.

Clerk of the Supreme Court of the State of Colorado,
By ———, Deputy.

183

Return to Writ.

UNITED STATES OF AMERICA, }
Supreme Court of Colorado, } ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said supreme court, in the city and county of Denver, this 20th day of August, A. D. 1904.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado,
By JOHN B. COOKE, Deputy.

Costs of Suit.

Plaintiff's costs, —, paid by Josiah Appleton Small.

Defendant's costs, —, paid by Frank Cole Brown.

Costs of transcript, \$44.00, one-half paid by Frank Cole Brown.

Clerk of the Supreme Court of the State of Colorado.
By ———, Deputy.

Endorsed on cover: File No. 19,470. Colorado supreme court. Term No. 98. Josiah Appleton Small, plaintiff in error, vs. Frank Cole Brown. File No. 19,471. Term No. 99. Frank Cole Brown, plaintiff in error, vs. Josiah Appleton Small. Filed September 5th, 1904. File Nos. 19,470 and 19,471.

CHICAGO, ILL., MAY 1, 1919

TO THE EDITOR:

SIR:

I have the honor to acknowledge the receipt of your letter of April 29, 1919, in relation to the above-captioned matter.

I am sorry to hear that you are unable to attend the meeting of the American Medical Association at Chicago, Ill., on May 1, 1919.

I am, Sir, very respectfully,
Yours truly,
J. H. HARRIS, Secretary.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 97.

FRANK COLE BROWN, *Plaintiff in Error*
v.

CHARLES DUNCAN GURNEY.

No. 98.

JOSIAH APPLETON SMALL, *Plaintiff in Error*
v.

FRANK COLE BROWN.

No. 99.

FRANK COLE BROWN, *Plaintiff in Error*,
v.

JOSIAH APPLETON SMALL.

Brief and Argument for Brown, Appellant
in Nos. 97 and 99 and Appellee in No. 98.

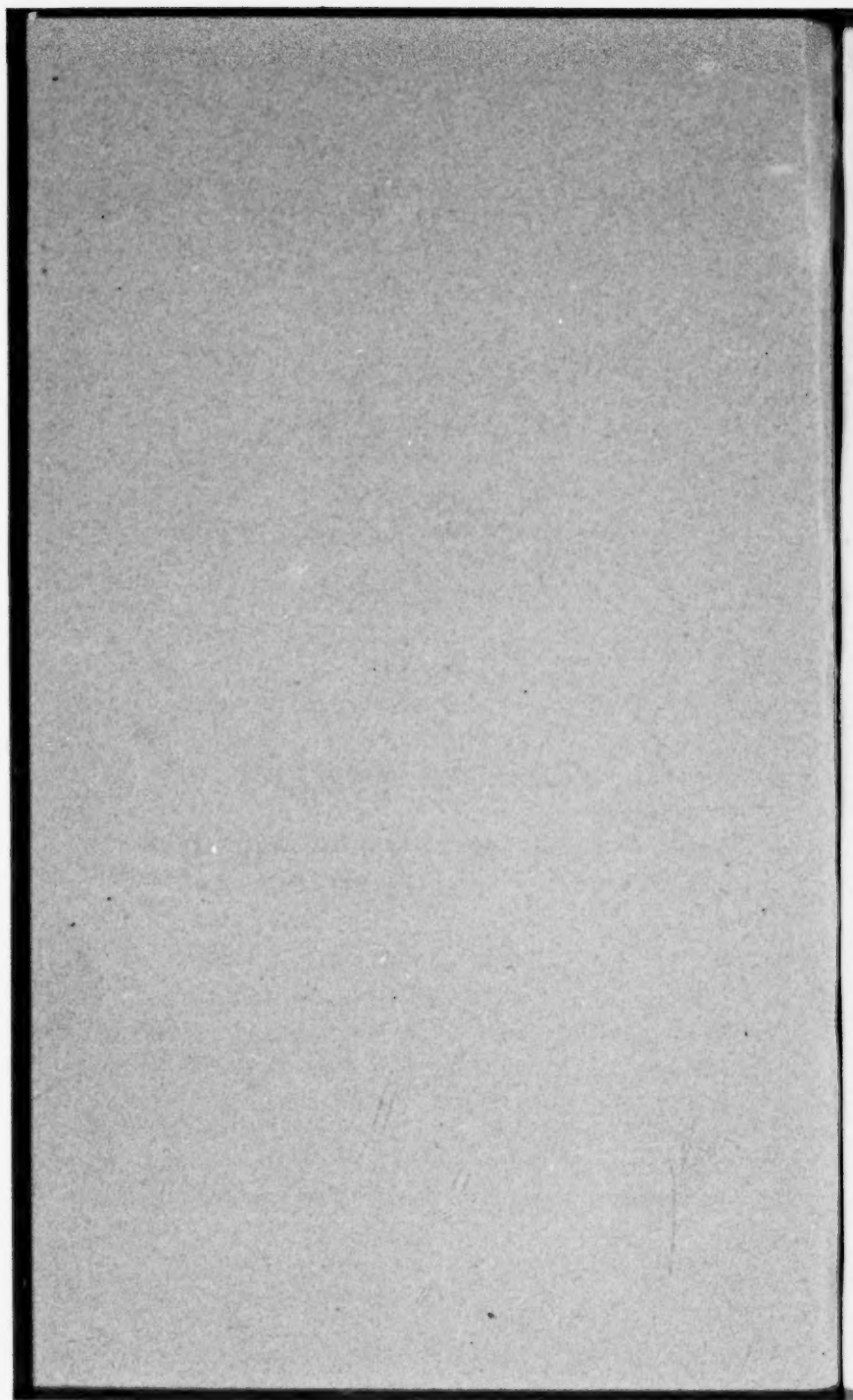
WILLIAM C. PRENTISS,
Attorney for Frank Cole Brown.

CHARLES F. POTTER,
HORACE F. CLARK,
Of Counsel.

Office Supreme Court U. S.
FILED

DEC 1 1905

JAMES H. MCKENNEY,
Clark.



Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 97.

FRANK COLE BROWN, *Plaintiff in Error*,

v.

CHARLES DUNCAN GURNEY.

No. 98.

JOSIAH APPLETON SMALL, *Plaintiff in Error*,

v.

FRANK COLE BROWN.

No. 99.

FRANK COLE BROWN, *Plaintiff in Error*,

v.

JOSIAH APPLETON SMALL.

**Brief and Argument for Brown, Appellant
in Nos. 97 and 99 and Appellee in No. 98.**

STATEMENT OF THE CASE.

These cases (two) were brought in the District Court of Teller County, Colorado, by the appellee Gurney and appellant and appellee Small in support of their adverse claims and protests filed in the local U. S. land office, as claimants of the Hobson's Choice and P. G. lode mining claims, respectively, against the application of the appellant Brown for patent for the Scorpion lode mining claim.

The complaint filed by Gurney sets up his title to the Hobson's Choice claim located June 23, 1898, and its conflict with the Scorpion claim, and alleges in effect that the area in conflict was not unoccupied and unappropriated public domain when the defendant entered and located the Scorpion claim on May 14, 1898. The only peculiarity to be noticed is the allegation

"that the defendant has ever since hitherto wrongfully withheld possession of the area in conflict from the plaintiff,"

which relates to the time of location of the Scorpion claim and amounts to an admission that Brown, as locator of the Scorpion, maintained continuous exclusive possession of the area in conflict.

The complaint filed by Small sets up his title to the P. G. claim and its conflict with the Scorpion claim and alleges that the defendant "has wrongfully entered upon" the area in conflict and "has ever since wrongfully withheld and now wrongfully withholds possession" thereof.

The defendant filed in each case a general denial and a further answer and cross-complaint setting up title to the Scorpion claim by virtue of prior discovery, location and appropriation.

In the trial court the cases were consolidated for the purpose of trial and tried together, without a jury, upon an agreed stipulation as to facts which eliminated all controversy as to the performance by each of the three claimants of all the acts required by law in the discovery, location, appropriation and maintenance of his claim, saving and reserving, however, with respect to each claim,

the question of whether the land covered thereby was vacant and unappropriated at the time of location, the reservation in the case of the Scorpion claim being expressed in the plural and covering two amended locations as well as the original location.

(Page references unless otherwise indicated are to the record in No. 97, *Brown v. Gurney*.)

It appears from the stipulation that Brown discovered and located the Scorpion claim May 13, 1898, and filed his certificate of location within three months thereafter, the date of filing not being stated; that he made an amended location on July 15, 1898, and the same day filed an amended certificate of location; and that on the following day, July 16, 1898, he made a second amended location and the same day filed a second amended certificate of location (R., pp. 19, 20).

That on June 22, 1898, Gurney discovered and located the Hobson's Choice claim and filed his certificate of location within three months thereafter, the date of filing not being stated (R., pp. 21, 22).

That on July 16, 1898, Small discovered and located the P. G. claim and filed his certificate of location within three months thereafter, the date of filing not being stated (R., pp. 20, 23).

As appears from the descriptions of the claims and areas in conflict in the pleadings, which in the stipulation are admitted to be correct (R., p. 24), the three claims cover substantially the same ground, and, so far as was within the power of the parties, the stipulation eliminated all issues except the question of whether the land was vacant and unappropriated when any of the locations were made.

The remainder of the stipulation relates to proceedings

in the land department purporting to be action in the matter of mineral entry No. 573, made by the Cripple Creek Gold Mining Company upon the Kohnyo and Fortuna lodes: but there is nothing in the stipulation itself, or the copies of such proceedings attached thereto as exhibits, showing any relevancy to the issue. In Exhibit K, decision of the Commissioner of the General Land Office of July 15, 1898, there appears (R., p. 59) a recital that F. C. Brown filed a protest averring that he is the owner of the Scorpion lode claim in conflict with the Southerly portion of the Kohnyo claim, but the extent of the conflict is not set forth, and, in any event, such a recital is not evidence.

The trial court found the issues in favor of Brown and entered judgment accordingly (R., p. 13-15,) the grounds of such finding and decision not appearing.

On appeal the Supreme Court of the State was confronted with the question of the relevancy of the proceedings in the matter of the Fortuna and Kohnyo claims, and in their opinion filed in the cause (R., 64) they state the question and dispose of it in the following language:

"Counsel for appellee, however, contend that the judgment must be affirmed because the agreed facts fail to identify the premises in dispute as part of the Kohnyo claim; do not establish the validity of that location, nor affirmatively show that the premises, when located as the Scorpion, were not part of the unappropriated public domain. The agreed statement will not bear this construction. It is evident from the record and the *briefs* of counsel, that the only question submitted for trial and the only one which the parties intended to litigate and have determined by the trial court was the time when the premises in controversy reverted to the public domain, and the judgment respecting their rights which would follow

the conclusion of law on this question. Or, in other words, the only question really submitted for trial was the point of time at which the premises in controversy were open to location. Upon the determination of this question, the decision as to which of the respective locations was valid, depended. This is apparent from the agreed statement of facts, for thereby it was conceded that each of the parties litigant had complied with all the requirements of the law in the location of their respective claims, as set forth in their respective pleadings, saving and excepting it was not admitted that at the time of the respective locations the ground in controversy was subject to location. As to each claim this question was reserved for the decision of the trial court by the following provision ;

'Provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain.'

"Counsel for appellee concede that the tract in controversy is substantially identical with the South tract of the Kohnyo lode, but say that such fact is not disclosed by the record. If not, it is rather strange that in the preparation of the agreed statement the various steps affecting the Kohnyo location were set out with such particularity. A discussion of the main question in the cases will demonstrate that the stipulated facts do establish the validity of the Kohnyo location, and that at the date of the location of the Scorpion the premises therein included were not a part of the unappropriated public domain. Appellee, however, is estopped from raising any of these questions now. His counsel state in their brief :

"'Upon the trial in the court below the stipulation of facts was not read by either party. * * * It was upon taking up the record before this court for the preparation of appellee's brief that the question of relevancy of the exhibits attached to the stipulation of facts first presented itself, * * *. From an examination of the record it

would appear to be a certainty that the case was tried in the lower court upon the assumptions which are wholly unsupported by the written evidence contained in the agreed statement of facts. * * * The truth of the matter is, that after the preparation, execution and filing of the agreed facts, the stipulation containing such facts was never again read or digested by any of the parties in interest. The trial court and counsel for all the parties litigant assumed that the stipulation covered facts which, upon investigation, we fail to find.'

"Facts assumed to be true on the trial of a cause cannot afterwards be contested on appeal—2 Cyc., 675. In short, it appears that counsel for both sides, on the trial of the cause, construed the stipulated facts as covering these questions, and on appeal they will be held to that construction. Again, none of these questions were raised in the court below. Had they been, and the attention of the court and counsel been called to the fact that the agreed statement omitted material facts, opportunity would have been afforded to correct the alleged omissions either by further stipulation or testimony. One of the cardinal principles of appellate procedure is, that questions sought to be reviewed shall first be brought before the trial court for decision. Otherwise a court of review would often be compelled to decide purely original questions which the trial court was given no opportunity to decide or determine—Elliott's Appellate Procedure, 489."

This court is thus confronted at the outset with the question, can deficiencies in the record be supplied in the manner adopted by the Supreme Court of the State in order to reverse the judgment of the trial court or must it be held that the record presents no evidence upon the question of whether the area in question was unappropriated public domain?

Gurney, as appellant in the court below, as an answer

to our point that the record failed to show the identity of the Southerly 700 feet of the Kohnyo claim with the ground in question, contended that, if the record were silent upon that point, there was no evidence upon the question whether the ground in dispute was unappropriated and, therefore, the act of March 3, 1881, would necessitate a judgment against both parties inasmuch as the burden was upon each of the parties to establish the fact that the land was unappropriated at the time of his location, but we contend that in the absence of evidence to the contrary the presumption must be that the land was unappropriated public domain when Brown made his original location of the Scorpion lode on May 13, 1898, and, the validity of such location in all other respects being admitted, Brown would prevail by reason of priority.

The ruling of the Supreme Court of the State upon the relevancy of the proceedings in the Land Department referred to seems, however, to make it necessary to argue the case upon the assumption that the three locations—Scorpion, Hobson's Choice, and P. G.—cover substantially the part of the Kohnyo claim described as the 700 feet thereof south of the Mount Rosa Placer, and, therefore, in order to fully present the case, we analyze and abstract that phase of the stipulation.

It is to be observed at the outset that the extent of the stipulation in every instance is only to admit that on such a date the Commissioner of the General Land Office or Secretary of the Interior rendered a decision, of which a copy is attached. There is no admission as to the location and maintenance of the Kohnyo claim, application to make entry, or issuance of certificate of entry or final receipt; and the question at once arises whether a copy of a decision

by the Commissioner of the General Land Office or the Secretary of the Interior is evidence of anything more than that on the day of its date such officer signed such a paper.

Exhibit A is a decision of May 28, 1895, by the Commissioner of the General Land Office reciting that a certain area in conflict between the Kohnyo claim and the Mount Rosa patented placer claim had been excluded from the Fortuna-Kohnyo entry and that such excluded area divided the Kohnyo claim into two non-contiguous tracts, one north of the placer claim extending about 500 feet in length along the lode line and containing the discovery shaft and improvements, and the other, south of the placer claim and extending for a distance of about 700 feet (see diagram, R., p. 32), and holding that the right to the Kohnyo lode terminated where it intersected the placer claim and that only one of the segregated tracts could be embraced in the entry, giving the claimant the right to elect which tract it would retain and allowing sixty days in which to furnish evidence of discovery of mineral in the South tract and the expenditure of \$500 thereon in case that tract should be retained, or to appeal, *in default of which the entry would be canceled as to the South tract without further notice.*

It does not appear when notice pursuant to this decision was served, but in **Exhibit B** (R., p. 25), decision by the Commissioner of the General Land Office of September 16, 1895, it is recited that he is in receipt of letter of the local officers dated August 14, 1895, transmitting a petition of the claimant of the Kohnyo lode asking that it be allowed under the then recent South Star decision (20 L.D., 204) to make application for patent for the area in conflict

with the placer upon the theory that the Kohnyo was a known lode within the placer at the time of application for patent therefor, and the local officers were directed to notify the Kohnyo claimant that it was allowed thirty days to apply for a hearing to determine whether the Kohnyo location contained a valuable lode within the placer limits and whether such lode was known to exist at the time of application for patent for the placer, and also to advise the claimant that in the event of failure to apply for a hearing within the time allowed the decision of May 25, 1896, would become final and the entry canceled in part.

In **Exhibit C** (R., p. 27), decision of the Commissioner of the General Land Office of January 8, 1896, it was stated that by office letter dated September 16, 1895 (Ex. B), the decision of May 28, 1895 (Ex. A), was modified and a hearing allowed (R., p. 29), and a motion by the assignee of the patentee of the Mount Rosa placer for review of the decision of September 16, 1895, and revocation of the order for hearing, was denied.

Exhibit D (R., p. 33), Commissioner's decision of February 5, 1896, dismissed an attempted appeal by the Mount Rosa owner, and **Exhibit E** (R., p. 35), decision of the Secretary of the Interior, April 7, 1896, denied an application by the same party for *certiorari*.

Exhibit F (R., p. 37), is Commissioner's decision of October 22, 1897, on appeal from the local officers, holding that the Kohnyo was not a known lode within the placer, at the time of application for placer patent, and denying the application of the Kohnyo claimant for leave to make application for the ground in conflict with the placer.

Exhibit G (R., p. 45), is Secretary's decision of May 7, 1898, on appeal, sustaining the Commissioner.

On May 14, 1898, Brown located the Scorpion claim.

Exhibit H (R., p. 51), is the following paper, which it is stipulated was filed in the General Land Office on June 14, 1898 :

STATE OF RHODE ISLAND, } ss:
County of Providence }

Lyman B. Goff, of lawful age, being first duly sworn, deposes and says that he is the duly elected and acting president of the Cripple Creek Gold Mining Company, which company is the owner of the Kohno and Fortuna Lode Mining claims, covered by Pueblo, Colorado, mineral entry No. 573, which was made March 6, 1895.

Affiant says that he has been duly advised as to the contents of a letter or decision of the Commissioner of the General Land Office of date May 28, 1895, and of the decision of the Secretary of the Interior of date of May 7, 1898.

With authority so to do, affiant hereby waives the right of review of the last mentioned decision, and elects to retain in said M. E. No. 573, that portion of the Kohno Lode claim which is described in the above mentioned letter of the Commissioner as "the five hundred feet on the North."

Further affiant saith not.

LYMAN B. GOFF.

Subscribed and sworn to before me, this 10th day of June, A. D. 1898,

ANDREW M. HULL,
Notary Public.

It will be observed that this paper was signed by Lyman B. Goff individually and, although evidently intended to be, was not expressed as, the act of the company, and, even though it could be regarded as purporting to be the act of

the company, the question arises whether the president of a corporation has power to relinquish property rights of the corporation acquired by entry of public land. This becomes especially significant when it is observed that three days later, on June 17, 1898, as appears by recital in Exhibit K, Commissioner's decision of July 15, 1898, at page 57 of the record, the claimant of the Kohnyo claim filed a petition praying that it be allowed under its then present application to patent the two detached parts of the Kohnyo claim, and, by recital in Secretary's decision of June 3, 1899, referred to in Exhibit J, at page 56 of the record, as being reported in 28 L. D., 451, it appears that it was also moved that action on the paper filed June 14, 1898 (Ex. H) be withheld until the application to retain the two detached portions of the Kohnyo claim should be finally disposed of.

On June 23, 1898, Gurney located the Hobson's Choice claim.

On July 15, 1898, the Commissioner of the General Land Office rendered a decision, **Exhibit K** (R., p. 57), reciting that the contest which ensued upon the application of the Kohnyo claimant to include in its entry the ground in conflict with the placer, had been finally decided adversely to the applicant, *and had been closed by Commissioner's letter of June 27, 1898* (a copy of which does not appear in the record); that on June 14, 1898, there was filed in the General Land Office the paper designated Exhibit H, and that, on June 17, 1898, the Kohnyo claimant filed the petition before mentioned, praying that it be allowed to patent under its then present application, the two detached portions of the Kohnyo claim for the reasons that a vein of mineral had been discovered and opened up in each end of

the Kohnyo claim and that it had been prevented by a conspiracy from developing the Southern end of its claim, and, therefore, had not had a fair opportunity to determine which end of its claim it would prefer to vacate; holding that in view of the fact that no motion for review of departmental decision of May 7, 1898 (Ex. G), affirming the Commissioner's decision of May 28, 1895 (Ex. A), was filed within the time prescribed by the rules of practice, the last mentioned decision (Ex. A) became final and that it then devolved upon the Commissioner's office to execute the same; and declaring the Kohnyo and Fortuna entry canceled as to the Kohnyo claim except the portion lying East (North) of the Mount Rosa placer and allowing the Kohnyo claimant sixty days from notice thereof to apply for an amended survey in accordance with decision of May 28, 1895, in default of which the entry would be canceled in its entirety.

Upon the day upon which this decision was rendered, July 15, 1898, Brown made an amended location of the Scorpion claim and on the following day, July 16, 1898, made a second amended location thereof, and on the same day Small located the P. G. lode claim.

Exhibit I (R., p. 52), is a decision of the Commissioner of the General Land Office under date of April 27, 1899, reciting that the Surveyor General had forwarded the field notes and plat of an amended survey of the Kohnyo and Fortuna claims, noticing a change in the location and direction of the lode line and the receipt of a protest by the claimant of the Hypatia lode claim averring that his rights would be interfered with by establishing the Southernly end line of the Kohnyo claim as returned in the amended survey, and allowing a hearing to determine

the true course and bearing of the Kohnyo lode. The decision also denied an application filed on April 10, 1899, by the Kohnyo claimant for the issuance of a patent for the Fortuna lode claim leaving the Kohnyo claim to be subsequently disposed of.

Exhibit J (R., p. 55), is a decision of the Commissioner of the General Land Office dated July 31, 1899, reciting that upon appeal from the decision of April 27, 1899 (Ex. I), the Secretary of the Interior rendered a decision June 3, 1899 (reported in 28 L. D., 451), permitting the Fortuna claim to go to patent as requested by the claimant, and allowing the Kohnyo claimant to commence proceedings for the reinstatement of the entry and directing that further action on the appeal be deferred until the question of the reinstatement of the Kohnyo entry as to the Southern portion of the Kohnyo location should be determined; that on July 18, 1899, the attorneys for the Kohnyo claimant filed a withdrawal of the appeal from the decision of April 27, 1899 (Ex. I), accompanied by a letter waiving all claim to right of reinstatement of the Southerly portion of the Kohnyo location and waiving all claim under the amended survey and conceding the course of the vein as given in the original location and survey, and applying for a further amended survey to establish the Southerly end line according to the course of the vein as given in the original location and survey; and concluding by allowing sixty days to apply for an amended survey in accordance with the decision of May 28, 1895 (Ex. A), or to appeal, in default of which the entry would be canceled as to the Kohnyo claim. This decision is the latest action of the Land Department exhibited in the stipulation.

Application for patent for the Scorpion claim was filed

June 19, 1899 (R., p. 23), Small filed his adverse claim on July 6, 1899 (R., p. 24), and Gurney filed his on July 17, 1899 (R., p. 24). It does not appear that an adverse claim was filed by the Kohnyo claimant.

Summons in this suit issued on September 16, 1899, and the stipulation as to facts appears to have been filed on June 15, 1901, when the case was submitted to the trial court.

Assuming for the sake of the argument that, as was held by the Supreme Court of the State, the Scorpion, Hobson's Choice and P. G. locations cover substantially the southerly 700 feet of the original Kohnyo claim and that the location and entry of, and issuance of a final certificate or receipt for, the Fortuna and Kohnyo claims are sufficiently established in the record, the questions that arise are,

First, whether the Fortuna-Kohnyo entry was valid as to said 700 feet tract and segregated that tract from the public domain;

Second, whether the entry of a mining claim upon application for patent prevents the initiation by location of rights which may be maintained in case the entry should be canceled, and,

Third, if such entry while it remains intact or uncanceled prevents the initiation of rights by location, at what stage in the proceedings in the matter of the Kohnyo entry the southerly 700 feet thereof became released therefrom and subject to relocation.

The supreme Court of the State, as appears by its opinion filed in the cause (R., p. 62), held that the Kohnyo location and entry prevented the initiation of rights by location,

that the southerly 700 feet of the Kohnyo claim became subject to relocation June 14, 1898, upon the filing in the General Land Office of the paper (Ex. H) signed by the president of the Cripple Creek Gold Mining Company, upon the theory that the filing of such paper was *ipso facto* an *extinguishment of the Kohnyo entry* as to the said 700 feet tract and *abandonment of possessory title* thereto, and that, therefore, the Hobson's Choice claim which was located on June 23, 1898, was superior in right as being the first located after the ground thus became subject to relocation; and reversed the trial court and entered judgment in favor of Gurney as against Brown and against both parties in the case of *Small v. Brown*.

Brown filed petitions for rehearing (R., pp. 70-74) which were denied (R., p. 74) and thereupon applied for writs of error to this court assigning the following errors (R., p. 75):

Assignment of Errors.

(1.) The said supreme court erred in over-ruling and setting aside the judgment of the trial court, because, under the agreed statement of facts, and the laws of the United States relating to the control and disposition of its public mineral lands by the Department of the Interior, plaintiff in error was entitled to his judgment.

(2.) The said supreme court erred in directing judgment to be entered in said court against plaintiff in error and in favor of defendant in error, because, under the agreed statement of facts, and the laws of the United States relating to the control and disposition of the public mineral lands by the Department of the Interior, the defendant in

error was not, and is not, entitled to judgment against the plaintiff in error, or to recover the premises in controversy.

(3.) The said supreme court erred in not giving due force and effect to the decision of the Land Department of the Government of the United States, to wit:—the decision of the Commissioner of the General Land Office, dated May 28, 1895, which expressly declared that the right to the lode terminated where it intersected and passed within the exterior boundaries of the patented placer claim, which placer claim divided the lode claim into two separate and distinct tracts.

(4.) The said supreme court erred in construing and determining the decision of the Land Department of the Government of the United States, to wit:—the decision of May 28, 1895, and the statutes and laws of the United States relating to the sale and disposition of its mineral lands by the said Land Department, in such a manner as to hold that the southerly seven hundred (700) feet of the lode location in question, was a part of the Kohnyo claim, until June 14, 1898, and that the judgment of cancellation of May 28, 1895, did not become operative prior to June 14, 1898, and that such judgment of cancellation was not conclusive and binding upon the supreme court of Colorado.

(5.) The said supreme court erred in holding that under the decision of the General Land Office of date, May 28, 1895, and the statutes and laws of the United States relating to the sale and disposition of its mineral lands, the lode claimant ever had or could have any right, title or interest in the southerly seven hundred (700) feet of the Kohnyo claim, or right to enter same for patent, without first

making a discovery of mineral thereupon, and making proof of such discovery to the Land Department, together with proof of the statutory expenditure of five hundred (\$500.00) dollars for the purpose of obtaining patent.

(6.) The said supreme court erred in holding that, upon the record in this case, the Kohnyo claimant was entitled to a conveyance of the said southerly tract, or to enter same in the United States Land Office for patent.

(7.) The said supreme court erred in not holding that under the judgment of the Land Department of May 28, 1895, the interest of the claimant in the said southerly tract—the premises in controversy in this suit—depended entirely upon the performance of conditions precedent, to-wit:—the discovery of mineral and the performance of five hundred (\$500.00) dollars patent labor, and the failure to perform the conditions within the stated time, lost to claimant the right of selection mentioned in such judgment.

(8.) The said supreme court erred in not giving due and proper effect and consideration to the decision of the Department of the Interior, of May 28, 1895, which held that a lode claim, intersected by a patented placer, cannot be allowed to include ground, not contiguous to that containing the discovery, and that the right to the lode claim in question, terminated where it intersected and passed within the exterior boundaries of the patented placer claim; and erred, in not holding that such judgment and decision was binding upon the supreme court of Colorado.

(9.) The said supreme court erred in holding that the judgment of the Land Department, of May 28, 1895, was without force or effect until the Kohnyo claimant, by its

written declaration, filed in the local land office, indicated its intention to patent the *north tract*, which had always been recognized as valid and which contained the discovery workings of the claim.

(10.) The said supreme court erred, in holding that the act on the part of the Kohnyo claimant in filing the written declaration known as "Exhibit H" in the Land Office, was in and by itself alone, the means of determining—under the judgment of the Land Department of May 28, 1895—when the ground in controversy in this suit became public domain. And in holding that the rights of the parties to this litigation must be determined solely by the act of filing said written declaration of June 14, 1898, and not by the judgment of the Land Department.

(11.) The said supreme court erred in holding that under the statutes and laws governing the sale and disposition of the public mineral domain, and the control and power of the Department of the Interior over same, the judgment of the Land Department of May 28, 1895, was not, and could not be the means of canceling the Kohnyo entry upon the premises in controversy, until the said Kohnyo claimant filed in the local land office the instrument known as "Exhibit H;" and in virtually holding that said judgment was without force or effect until more than three years after it was rendered.

(12.) The said supreme court erred in holding that the premises in controversy in this suit, did not revert to the public domain, and was not a part of the public domain until June 14, 1898, when the Kohnyo claimant filed "Exhibit H" in the local land office.

(13.) The said supreme court erred in holding that the said decision of the Land Department, of May 28, 1895, was not a judgment of cancellation, as to the premises in controversy in this suit.

(14.) The said supreme court erred in holding that the judgment of May 28, 1895, of the Land Department of the Government did not—as to the premises in controversy in this suit—become final sixty (60) days after same was rendered, and thereupon, become conclusive and binding upon the Kohnyo claimant and upon the courts.

(15.) The said supreme court erred in holding that the judgment of the Land Department of May 28, 1895, which allowed the claimant sixty (60) days in which to furnish the required evidence, or to appeal—in default of which, the entry would be canceled to the extent of the premises in controversy—did not become a final judgment upon the failure of the claimant to either appeal or furnish the evidence required; and in holding that under the said judgment, the land did not—at the end of said sixty (60) days' time (there being no appeal or proofs furnished)—become subject to location and entry by the first legal applicant.

(16.) The said supreme court erred in holding, that under the statutes and laws of the United States relating to its mineral lands, and the control, sale and disposition of same by the Department of the Interior, the premises in controversy *was* not public mineral domain, and subject to location by plaintiff in error, on May 13, 1898, when he located his Scorpion Lode claim.

(17.) The said supreme court erred in not affirming

the judgment of the trial court, giving to plaintiff in error, his rights under the statutes and laws of the United States, as first legal locator and applicant for the mineral premises in controversy.

Points and Argument.

I.

The stipulation contains no evidence upon the question of whether or not the land in question was vacant or unappropriated and subject to location.

This, as we have shown, results, first, from *the failure of the parties to stipulate that the three conflicting locations in question cover the Southerly part of the Kohnyo location*. The acceptance of the application of Brown by the local officers is evidence that the land was unappropriated and subject to entry, but even in the absence of evidence the presumption must be that land in the so-called public land States has remained unappropriated (*Lockhart v. Johnson*, 181 U. S., 516); and, therefore, Brown, being prior in time, must be held to be paramount in right of possession.

Again, there is no competent evidence of the existence of the Kohnyo location or the fact that entry of the same had been made.

The stipulation merely introduces copies of land department decisions with the statement in each case "That on the rendered a decision of which a certified copy is hereto attached and marked Exhibit......"

The proper proof of a mineral entry would be the full record of the application and final receipt accompanied by

the survey so as to fix the locus. *Culver v. Uthe*, 133 U. S., 655. And proper proof of a mining location, embraces evidence of discovery, etc., location notice, certificate of location and assessment work.

Recitals in departmental decisions are mere hearsay and the decisions themselves are evidence only that the officer rendering them signed such papers on the day of the date thereof. *Sabariego v. Maverick*, 124 U. S., 261.

And the paper, Exhibit H, filed on June 14, 1898, is not evidence of anything except that such a paper was filed in the General Land Office.

II.

The identity of the ground in question with the Southerly part of the Kohnyo location and the existence of the Kohnyo location and entry cannot be established by *concessum* of counsel on appeal or by any permissible legal inference from the record.

The office of the appellate court is to review the judgment of the trial court upon the record and error must affirmatively appear before there can be a reversal.

The principle "that questions sought to be reviewed shall first be brought to the attention of the trial court," has no application, for the appellant here was appellee in the court below and was not seeking to have the decision of the trial court reviewed, but merely insisting that *upon the record* the decision of the lower court was right.

Nor does the doctrine of estoppel apply. The appellant here was not seeking to raise any questions in the State Supreme Court, but insisting that the questions sought to be argued by the appellant were not presented by the record. There are proper cases where an *appellant* is

estopped on appeal from objecting that facts necessary to support the judgment were not proved, but here, on the contrary, Gurney as appellant in the court below sought to set up facts not shown by the record, but necessary as the foundation of his attack upon the judgment of the trial court.

That a missing fact cannot be supplied by concession of counsel in the appellate court seems too elementary for argument and the ruling of the court below on this question is surprising in view of the previous decisions of the same court.

In *Pueblo v. Robinson* (12 Colo., 593, 599), it was said:

"By the agreed statement of facts it does not affirmatively appear that the lots on the east side of Santa Fe avenue were exempted from assessment, because the side of such lots abutted on the sewer without deriving any benefit therefrom, *though the argument of counsel for appellees virtually concedes that the exempted lots do abut laterally.* Neither does it appear whether the lots assessed were of substantially uniform depth or otherwise. In view of the fact, however, that appellees in applying for the injunction *assume substantially the affirmative of the issue*, we must, where the agreed statement is silent, resolve mere questions of fact against them."

See also *Parker v. People*, 7 Colo. App., 56, 58.

Reddicker v. Lavinsky, 3 Colo. App., 159-161.

Martin v. Force, 3 Colo., 199-200.

Evans v. Young, 10 Colo., 316-324, 5.

Leach v. Lothian, 10 Colo., 439.

Parkison v. Boddiker, 10 Colo., 503-513.

Schwed v. Robson, 12 Colo., 400-401.

Parker v. People, 13 Colo., 155.

Empire Land & Canal Co. v. Engley, 14 Colo., 289.

Townsend v. Fulton Co., 17 Colo., 145.

This court has never permitted concession of counsel to supply deficiencies in the record.

In *Zadig v. Baldwin*, 166 U. S., 485, the point was whether a federal question appeared in the record. but the language of the court is equally applicable here. Mr. Justice White said:

"The contention that there was a Federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state in which such a Federal question is discussed, and it is asserted orally at bar that in the oral argument made in the supreme court of California a claim under the Federal Constitution was presented. But, manifestly, the matters referred to form no part of the record and are not adequate to create a Federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state."

III.

The pendency of a mineral entry does not prevent location by another of the ground covered thereby, and such location becomes effective if the entry be canceled or relinquished and the possessory title forfeited or abandoned.

The appellee Gurney's contention is that Brown's location was made while the Kohnyo location and entry were subsisting and that his own location was made after the Kohnyo location and entry had been eliminated as to the ground in question.

If, however, the point we now make be sustained, it is immaterial when the Kohnyo entry was canceled or relinquished; but assuming, for the sake of the argument, that, as contended by Gurney, the Kohnyo entry was subsisting when Brown's original location was made and was thereafter, and before Gurney's location, relinquished and such relinquishment was as effective as formal cancellation, the case is similar to the recent case of *Lavagnino v. Uhlig* (198 U. S., 443) in all respects except that the senior claim in that case was only a possessory title while here it had reached the stage of entry. There the locator third in time sought to defeat the second by showing that the second location was made while the first remained valid, while here Gurney seeks to defeat Brown by setting up the Kohnyo location and *entry* as subsisting when Brown's original location was made.

The principle and reasoning of the *Uhlig* case, however, apply here with equal force. There Mr. Justice White said :

"The question then is, where there was a conflict of boundaries between a senior and junior location, and the senior location has been forfeited, has the person who made the relocation of such forfeited claim the right, in adverse proceedings, to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim ?

"To say that the relocater had such right involves, necessarily, deciding that, as to the area in conflict between the junior and the senior locations, the junior could acquire no present or eventual right whatever, and that, on the abandonment or forfeiture of the senior claim, the area in conflict became, without qualification, a part of the public domain. In other words, the proposition must come to

this: that as the junior locator had acquired no right whatever, present or possible, by his prior location, as to the conflicting area, he would be obliged, in order to obtain a patent for such area, to initiate in respect thereto a new right, accompanied with a performance of those acts which the statute renders necessary to make a location of a mining claim.

"The deductions just stated are essential to sustain the right of the relocater of a forfeited mining claim to contest a location existing at the time of the relocation, on the ground that such existing location embraced an area which was included in the forfeited and alleged senior location, for the following reasons: If the land in dispute between the two locations, which antedated the relocation, did not, on the forfeiture of the senior of the two locations, become unqualifiedly a part of the public domain, then the right of the junior of the two would be operative upon the area in conflict on a forfeiture of the senior location. If it had that effect it necessarily was prior and paramount to the right acquired by a relocation of the forfeited claim.

"But we do not think that the deductions which we have said are essential to sustain the right of the relocater to adverse, under the circumstances stated, can be sustained consistently with the legislation of Congress in relation to mining claims. Indeed, we think such a construction would abrogate the provisions of Sec. 2326 of the Revised Statutes, which is as follows:

"Sec. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question

of the right of possession and prosecute the same with reasonable diligence to final judgment ; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever.'

"This section plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice, and performed the other acts made necessary to entitle to a patent, and who makes application for the patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section. Thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for

which a patent is sought, he may abandon such rights and cause them in effect to inure to the benefit of the applicant for a patent by failure to adverse, or, after adverseing, by failure to prosecute such adverse.

"It cannot be denied that under Sec. 2326, if, before abandonment or forfeiture of the Levi P. claim, the owners of the Uhlig locations had applied for a patent, and the owners of the Levi P. had not adverseed the application, upon an establishment of a prima facie right in the owners of the Uhlig claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice. *Gwillim v. Donnellan*, 115 U. S., 45, 51, 29 L. Ed., 348, 350, 5 Sup. Ct. Rep., 1110. And the same result would have arisen had the owner of the Levi P. adverseed the application for a patent based upon the Uhlig locations, and failed to prosecute, and waived such adverse claim.

"In both of the supposed instances the necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location, and not subject to be acquired by another person. And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver, if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator, and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete.

"Of course the effect of the construction which we have thus given to Sec. 2326 of the Revised Statutes is to cause the provisions of that section to qualify sections 2319 and 2324 (U. S. Comp. Stat. 1901, pp. 1424, 1426),

thereby preventing mineral lands of the United States which have been the subject of conflicting locations from becoming, *quoad* the claims of third parties, unoccupied mineral lands by the mere forfeiture of one of such locations."

It is elementary that possessory title to a mining claim is acquired by discovery and location entirely aside from any proceedings in the local land office or the Land Department, that possessory title may be maintained indefinitely, and that patent proceedings, the object of which is the acquisition of the fee, are separate and distinct from the acquisition and maintenance of possessory title.

Location proceedings and patent proceedings are separate and distinct, and application for patent and entry do not affect the status of the ground, so far as possessory title is concerned, *unless patent finally issue* and, by relation back, cut out any intervening claims. If the patent proceedings prove abortive and the entry be canceled there can be no relation back; and it follows that the force and effect of the certificate of purchase is destroyed. In such case, as recognized in *Clipper Mining Company v. Eli Mining and Land Company* (194 U. S., 220, 226), the applicant is relegated to his possessory title, and it logically follows that such possessory title, in order to remain valid, must have been supported by the necessary acts in the interim.

The statute, R. S. U. S., Sec. 2324, provides that—

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year; * * * and upon a failure to comply

*with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made. * * **

It necessarily follows from this provision that application for mineral patent does not segregate the land from the public domain so as *ipso facto* to prevent relocation of the claim and, inasmuch as annual assessment work is required *until patent issues*, it also follows that only patent proceedings culminating in the issuance of patent can cure failure to perform requisite annual work in the interim, and a relocation for forfeiture even after entry must prevail unless patent actually issue.

The conclusion is that in the case of mineral land there is an exception to the general rule applying to land office proceedings and that possessory rights to mining claims may be acquired and maintained irrespective of patent proceedings unless such proceedings culminate in the issuance of patent.

In view of Section 2324 the Land Department recognizes that an applicant for mineral patent may lose his possessory title by forfeiture after application and before making entry and in early cases, even after entry, upon protest setting up relocation for forfeiture, a hearing was ordered and, if it appeared that there was reasonable ground for the relocation, the entry was canceled and the applicant relegated to his possessory title in order that the controversy as to right of possession might be determined by the courts. *Little Pauline and Leadville Lodes*, 7 L. D., 506; *Sweeney v. Wilson*, 10 L. D., 157.

In later cases the Department has held that mere lapse of time between application and entry justifies cancellation

of the entry without a hearing, saying in *Cain v. Addenda Mining Company* (29 L. D., 62):

"The mining laws contemplate that proceedings under an application for patent should be prosecuted to completion within a reasonable time after the required publication, or after the termination of proceedings on adverse claims, if any are filed; otherwise by making application for patent and giving notice thereof, but without making payment of the purchase price one would become entitled to project, indefinitely into the future, the assumption of Section 2325 'that no adverse claim exists' notwithstanding the requirement of Section 2324 that an expenditure of one hundred dollars in labor or improvements should be made upon a mining claim during each year until entry is allowed."

and holding that failure of the applicant to prosecute to completion its application within a reasonable time after publication and after the termination of adverse proceedings in the courts (which had intervened in that case), constituted a waiver of all rights acquired by the earlier proceedings upon the application.

And in *P. Wolenberg et al.* (29 L. D., 302) the Secretary said (p. 305):

"In this case nearly two years elapsed after the required publication before any effort was made to carry the application to completion, and in the meantime there may have been, as claimed, a legal relocation of the claim, based upon a failure by the claimants to make the annual expenditure in labor or improvements which is necessary to the continued maintenance of their possessory right as against subsequent locators. The assumption, declared in section 2325 of the Revised Statutes, that no adverse claim exists in those instances where no adverse claim is filed in the local office during the period of publication, relates to the

time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time and which could not therefore have been made known at the local office during the period of publication. The statutory declaration does not compel any assumption in this instance to the effect that no adverse claim intervened between the earlier proceedings upon the application for patent, which ended February 3, 1897, and the making of the entry on December 21, 1898. In the presence of the claimed relocation of the Mascot after the expiration of the period of publication, the applicants for patent are not in a position to ask or urge that their laches or delay be disregarded. It follows that the entry must be canceled. The applicants will be at liberty to renew proceedings for patent if they so desire, and Christy will have opportunity to present, for determination by the proper tribunal, his claim under his alleged relocation.

The decision of your office ordering a hearing upon said protest is therefore vacated, and the matter will be disposed of by your office in accordance with the views herein expressed."

The applicants in that case compromised with the protestant and secured withdrawal of the protest, yet the Secretary upon review (29 L. D., 488) held that the same result followed even in the absence of protest, saying (p. 490):

"It was stated in the former decision that in the presence of the asserted relocation of the Mascot claim, the applicants for patent were not in a position to urge that their laches or delay be disregarded. The subsequent compromise with the protestant, whereby the withdrawal of his protest was secured, does not place them in such a position in this respect as requires the Department now to disregard

their laches and delay. It is not believed that the facts of this case would justify such a course, or that good administration would be promoted thereby. Before the entry of the Mascot and Pennsylvania claims others than Christy may have made relocations of all or portions thereof on account of the alleged failure of Wolenberg *et al.* to do the required annual assessment work, and the only method prescribed for giving notice to and protecting the rights of any such relocater is that set forth in sections 2325 and 2326 of the Revised Statutes. Barklage *et al. v.* Russell, 29 L. D., 401; Brady's Mortgagee *v.* Harris *et al.*, Ibid, 426"

See also Lucky Find Placer, 32 L. D., 200; Adams *v.* Polglase, Id. 477.

And in any case if patent proceedings are found defective and the right to patent is found not to exist, the entry is canceled, and the applicant required to republish, because in such case the ground must, under Sec. 2324, remain subject to relocation "until a patent has been issued therefor."

In his latest decision upon this point (Jaw Bone Lode *v.* Damon Placer, 34 L. D., 72, at 76) the Secretary said :

"An application for mineral patent which has thus been rejected may, then, unless in itself or for any extrinsic reason fatally defective, be made the instrument of renewed patent proceedings. In any such case, however, it must be treated as refiled (and should be so endorsed by the register), and as again taking effect, as of the date formal application is made to that officer for republication of notice thereof, which must in all cases be promptly had. Where in any case that date can not afterwards be ascertained the application must of necessity be held to have taken renewed effect as of the date of the first publication of the new notice."

These considerations lend special significance to the proviso inserted in all certificates of mineral entry pursuant to paragraph 52 of the United States Mining Regulations, which reads :

"Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, permit the claimant to pay for the land according to the area given in the plat and field notes of survey aforesaid, at the rate of five dollars for each acre and five dollars for each fractional part of an acre, except as otherwise provided by law, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, *after which the complete record will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.*"

The prescribed official form of certificate is, as follows :

[4-201.]

N.

REGISTER'S FINAL CERTIFICATE OF ENTRY.

MINERAL ENTRY

UNITED STATES LAND OFFICE

No.....

at.....

LOT No.....

....., 1 .

It is hereby certified that in pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two and legislation supplemental thereto
 whose Post-office address is.....

on this day purchased that *Mining Claim* known as the

..... Section, in Township No.
 of Range No. meridian, designated
 as Lot..... No. said Lot
 No. extending

..... feet in length along said
 vein or lode, *expressly excepting*
and excluding from said purchase all that portion of the
 ground embraced in mining claim..... or survey.....
 designated as Lot..... No.

and also all that portion of any vein or lode the top or
 apex of which lies inside of said excluded ground; said
 Lode..... claim, as entered, embracing

..... acres, and said Mill-Site claim..... acres,
 in the..... Mining District, in the County
 of..... and..... of

as shown by the plat and field-notes of survey thereof, for
 which the said part..... first above named this day made
 payment to the Receiver in full, amounting to the sum
 of..... dollars.

Now, THEREFORE, be it known that upon the presen-
 tation of this Certificate to the *Commissioner of the*
General Land Office, together with the plat and field-
 notes of survey of said claim and the proofs required
 by law, a Patent shall issue thereupon to the said.....

.....
if all be found regular.

.....
Register.

The statutes by which the regulation quoted is sanctioned are sections 2325, 2326 and 2328 governing the patenting of lode claims.

Section 2325 concludes:

"If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326, covering adverse claims and suits, provides, *inter alia*:

"After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper

fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights.

Section 2328 provides, *inter alia*:

"Applications for patents for mining-claims under former laws now pending may be prosecuted to a final decision in the General Land Office."

It will thus be seen that the certificate of entry (or purchase) is in reality only provisional, entitling to patent in case "all be found regular" by the Commissioner of the General Land Office.

Comparison with the regulations under the forest lieu selection law, considered by this court in *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S., 301, 315, shows that the procedure in the two cases is equivalent in the respect that the function of the local officers is merely to permit the applicant to make payment and forward the complete record to the Commissioner for examination, and the ruling of the court in that case would seem to also apply to the case of mineral entry and support our contention that certificate of entry in such case, so far as preventing acquisition of possessory title is concerned, is effective only in case the right to patent exists, i. e., "all be found regular," and patent does subsequently issue.

In the *Cosmos* case this court said :

"Among the rules it is provided :

"16. Where final certificate or patent has issued, it will be necessary for the entryman or owner thereunder to

execute a quit-claim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for.

"18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with report as to the status of the tract applied for."

"The 'consideration,' mentioned in rule 18, is clearly not of the character of a review of a decision already made by the local land officers, but is in the nature of an original consideration of the subject by the General Land Office, to which office the final decision belongs. The *applications* are to be forwarded, not a decision by the local land office, together with a report (not a decision) as to the status of the land. This rule makes it the duty of the local land officers merely to forward the various applications to the General Land Office, and an original decision is to be made by the latter office upon the papers transmitted to it."

* * * * *

"But, as has already been stated, there is nothing in the statute of 1897 which gives the local land officers the right to decide whether the selector has complied with the provisions of the act, and unless those officers had that power they did not acquire it by assuming to exercise it. We do not say they did so assume. They received, accepted and filed the deed, the abstract of title, the non-mineral affidavit and the selection as made by Clarke. They entered that selection upon the official records of the land office and they certified that it was free from conflict, and that there was no adverse filing, entry, or claim thereto, but it can not be said that they decided that the selector had complied with the provisions of the statute or that he had done

all that he ought to have done in order to acquire his alleged complete, equitable title."

* * * * *

"Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to the land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it."

In the same case this court, recognizing the doctrine of relation back, said:

"It may be that when the decision of the land department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue from the time the selection of the lands was made in the local land office, and when a patent subsequently issues the legal title will vest from the time of selection."

In *Benson M. & S. Company v. Alta M. & S. Company* (145 U. S., 428) it was held that after entry the applicant for patent for a mining claim is not obliged to continue

annual assessment work, and that a relocation by another under claim of forfeiture for failure to perform such work pending the patent proceedings was ineffectual. *There, however, patent actually issued.* The point decided was that the patent related back and all that the court say, *arguendo*, is based upon the assumption that "the right to the patent exists," a condition which is also attached to the language quoted from previous cases.

The court is now confronted with the case where the right to patent did not exist and patent was refused and the entry canceled, or, as claimed by Gurney, relinquished.

The question of a relocation pending adjudication of a mineral entry subsequently canceled was before the Supreme Court of Montana in *Murray v. Polglase*, 23 Montana, 401; 59 Pac. Rep., 439 (1899), and that court in a carefully considered opinion reviewed the decisions upon the force and effect of a receiver's certificate of mineral entry, drew the distinction we have suggested, and sustained the present contention. The argument of the court is so complete and convincing that we venture to quote from it at some length :

"It is conceded on both sides that when a locator, having complied with the law, in good faith completes his proof and pays the purchase money, his equitable title is complete. The conditions are then all performed, and no further obligation rests upon the applicant to expend money in doing the annual representation work. Even if the patent is delayed for any reason, still when it is finally issued it is evidence of the regularity of all previous acts, and relates back to the date of the original entry, so as to cut off intervening rights. Indeed, the decisions are uniform on this question wherever it has been considered. *Deno v. Griffin*, 20 Nev. 249, 20 Pac. 308; *Aurora*

Hill Consol. Min. Co. v. 85 Min. Co. (C. C.) 34 Fed. 515; Benson Mining & Smelting Co. v. Alta Mining & Smelting Co. 145 U. S., 428, 12 Sup. Ct. 877, 37 L. Ed. 762; Barringer & A. Mines & Min. 265; In re Harrison, 2 Land Dec. Dep. Int. 767. But we have not been able to find any adjudicated case upon the exact question presented here. Counsel have cited none, and we therefore conclude that there is none. This fact, however, is to be noted: That in all the cases cited, except those arising out of railroad grants, the presumption has obtained that the entry in question was made in good faith, and in each one of them the entry was a subsisting one at the time the controversy arose. Counsel for defendants have cited U. S. v. Steenerson, 1 C. C. A. 552, 50 Fed. 504. In that case one Hanson had made a pre-emption entry upon public land, and on November 1, 1884, made his final proof, and received a certificate of purchase. He at once conveyed the land to Steenerson, one of the defendants. During the winter of 1885-1886 the firm with which Steenerson was associated cut from the land 754,000 feet of logs, and had them in their possession. In April, 1886, the United States brought suit in replevin to recover the logs, claiming that the title to the land, and therefore to the timber, had not vested under the entry, on account of fraud practiced by Hanson in making it. During the pendency of the suit, and before the trial, the entry was canceled by the Commissioner of the land office on the ground that the entry was not made in good faith for actual settlement, but for the purpose of enabling Steenerson and his associates to strip the land of the timber thereon. The Circuit court of appeals sustained the action. We quote from the opinion by Judge Shiras: 'The final certificates or receipt acknowledging payment in full, and signed by the officers of the local land office, is not in terms, nor in legal effect, a conveyance of the land. It is merely evidence on behalf of the party to whom it is issued. In a contest involving the title to land, wherein a person claims adversely to the

United States, it is open to such claimant, notwithstanding the legal title remains in the United States, to prove that, by performance on his part of the requisite acts, he has become the equitable owner of the land, and that the United States holds the legal title in trust for him; but as the claimant in such case has not received a patent or formal conveyance, and has not become possessed of the legal title, he is required to show performance, on his part, of the acts which, when done, entitle him, under the law, to demand a patent of the land. When evidence of this kind is offered on behalf of the claimant, it is open to the United States to meet it by proof of any fact or facts which, if established, will show that the claimant has not become the real owner of the realty. If it be true, in a given case, that the entry of the land was not made in good faith, but in fraud of the law, certainly it cannot be said that the claimant has become the equitable owner of the land, and that the United States is merely a trustee holding the legal title for his benefit. Fraud vitiates any transaction based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist.' The case is not in point upon the question here considered, but it is suggestive, in that the court emphasizes the necessity resting upon the entryman to perform in good faith all the conditions required by law before he makes the entry. These are conditions precedent, and without the performance of them in good faith no title vests. The cancellation of plaintiffs' receipt adjudicated the fact that they obtained no title at all by their entry. By this judgment of the authorities of the land office they were deprived of the ability to claim any rights under it. They were left with just such rights as they had at the time they obtained it. If they chose to rely upon it as evidence of their title, and then forbore to preserve their rights by doing the acts necessary to preserve them, they are not now in a position to assert that they have lost nothing. They

stand in the same position as they would have stood on January 1, 1888, if they had not obtained the receipt at all. They cannot be heard to say that during the time the receipt was outstanding the land was withdrawn from the mass of public lands, and that defendants acquired no rights under their location. Plaintiff's rights were forfeited, and the Maud S. claim was subject to relocation, at the time the Ramsdell claim was located. To hold otherwise would be to lend assistance to the fraud attempted by plaintiffs, and which would have been successful but for its exposure made by defendants and their predecessors. It would permit them to profit by their own misconduct, in violation of the principle expressed in the wholesale maxim, '*Nemo allegans suam turpitudinem est audiendus.*'"

The same case came before the Land Department (*Adams v. Polglase*, 32 L. D., 477), and the Secretary said:

"It is contended by the protestants, in substance, that the location upon which the Ramsdell application is based is absolutely void because made upon land at that time segregated from the public domain by the then-subsisting Maud S. entry.

"The Maud S. entry was canceled by the Land Department, as the result of the proceedings had on the protest filed by the Ramsdell lode claimants, on the ground that an expenditure of the value of \$500 in labor or improvements had never been made upon or for the benefit of the Maud S. claim, as required by section 2325 of the Revised Statutes. Compliance with this requirement of the statute prior to the expiration of the period of publication is an indispensable prerequisite to entry and patent, and without such compliance there can be no valid entry. It may be conceded, however, that while the Maud S. entry stood uncanceled of record, the lands covered thereby were not properly subject to location. But when that entry was canceled, the lands from such date became subject to loca-

tion, and the prior location by the Ramsdell lode claimants became from such time effective, if rights thereunder were then being, and were thereafter asserted according to the mining law. On this question there does not seem to be any doubt. See *Noonan v. The Caledonia Gold Mining Company* (121 U. S., 393)."

Upon review (33 L. D., 30), the Secretary said :

"It is urged in support of the motion for review, among other things, in substance and effect, that it was error to cite the case of *Noonan v. Caledonia Gold Mining Company*, *supra*, as authority for the holding above quoted, in view of the later decision of the Supreme Court of the United States in the case of *Kendall v. San Juan Mining Company* (144 U.S., 658), citing and explaining the *Noonan* decision, for the reason that the Ramsdell lode claimants did not make a new location or re-record notice of their old location after the cancellation of the Maud S. entry and prior to the location made by protestants.

"Both the *Noonan* and the *Kendall* case, *supra*, involved mining locations made upon lands embraced within Indian reservations, and at such time not subject to the mining laws, which subsequently, upon extinguishment of the Indian reservations, became subject to the operation of said laws. The land here involved was not embraced within any Indian reservation, but was public land of the United States subject to the mining laws, although, at the time the location in question was made, covered by an invalid mineral entry. The *Noonan* case was cited in the decision sought to be reviewed only for the reason that the holding therein is in line with the long-established ruling of the Department, in cases similar to the present one, to the effect that mining locations or entries under the public land laws, made upon lands not at the time regularly subject thereto, may nevertheless, if maintained in good faith, and the land subsequently becomes subject to such location or entry, be permitted to remain intact, as having attached

on such date, if at that time there be no adverse claim. (See Rob Roy lode, 1 Brainard, 173; Dobbs Placer Mine, 1 L. D., 565, 568; Gunnison Crystal Mining Co., 2 L. D., 722, 724-5; Myer *et al.* v. Hyman, 7 L. D., 336; Moss Rose Lode, 11 L. D., 120; Colomokas Gold Mining Co., 28 L. D., 172, 174).

"There being no claim to the land here involved adverse to that of the Ramsdell lode claimants at the date of the cancellation of the Maud S. entry, the Department is of opinion that the holding in the cases cited is clearly applicable in the present case."

It will be observed that the Secretary declares the distinction between a location made upon land in reservation and one made upon ground covered by a mineral entry, viz: that in the one case the land is not at the time subject to the operation of the mineral laws, while in the other it is still subject to the operation of those laws, notwithstanding the subsisting entry, and, therefore, a location duly made before cancellation of the entry becomes valid upon such cancellation if the possessory title upon which entry was made fall for any reason.

It follows, therefore, that Brown's right is superior even under Gurney's contention that the Kohnyo entry, as to the south 700 feet thereof, was eliminated by the paper (Ex. H) filed in the General Land Office on June 14, 1898, for it is admitted that Brown was then and thereafter in possession and had theretofore performed, and continued thereafter to perform, all acts necessary to sustain a valid location, while Gurney did not initiate his claim until June 23, 1898, and Small did not initiate his until July 16, 1898.

IV.

Still admitting, for the sake of the argument, Gurney's contention as to the time of elimination of the Kohnyo entry as to the ground in question, Brown's rights are yet superior even under the doctrine of *Noonan v. Caledonia Gold Mining Company* and *Kendall v. San Juan Mining Company*, *supra*, if applicable, for on July 15 and 16, 1898, he made amended locations of the Scorpion claim and filed amended or additional certificates (R., p. 20).

The Colorado Statute (2 Mills. Ann. Stat., 1891, section 3150), provides :

The discoverer of a lode shall, *within three months from the date of discovery*, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain :

First—The name of the lode.

Second—The name of the locator.

Third—The date of location,

Fourth—The number of feet in length claimed on each side of the center of discovery shaft.

Fifth—The general course of the lode as near as may be. (L. 74, p. 186, Sec. 3 ; G. L., '77, pp. 629, 630, Sec. 1813 ; G. S., 983, p. 722, Sec. 2399.)

Also (Ibid Sec. 3160) :

If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an over-lapping claim

which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act; *Provided*, That such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location. (L. '74, pp. 188, 189, Sec. 13; G. L. '77, pp. 631, 632, Sec. 1823; G. S. '83, pp. 724, 725, Sec. 2409.)

These considerations seem to render it unnecessary, so far as Gurney's status is concerned, to consider whether the Kohnyo entry as to the 700 feet in question was valid or, if valid, when, as a matter of law, was eliminated; but, if it be necessary to enter into a discussion of those questions we contend, first, that

V.

The Kohnyo entry, upon the face of the application papers, was illegal and void as to the Southerly 700 feet thereof and did not operate to segregate that tract from the public domain.

[The argument under this and following points is based upon the contingency that the exhibits of decisions of the Land Department may be held to be sufficient evidence of facts recited therein as to the record of the Fortuna-Kohnyo application and entry, and in so treating such recitals we

in no wise relinquish our contention that so far as appears by the record the proceedings relating to the Kohnyo location and entry are irrelevant.]

It is elementary that the vein or lode is the principal thing in a mining location and the surface ground a mere incident.

"A mining claim * * * may equal but shall not exceed one thousand five hundred feet in length along the vein or lode." (R. S. U. S., Sec. 2320.)

The location can be valid only to the extent of the lode and if the lode terminates at a point within the location, the location beyond such point is invalid. *Armstrong v. Lower* (6 Colo., 393, 581); *Patterson v. Hitchcock* (3 Colo., 533); *Zollar v. Evans* (5 Fed., 172).

It appears from recitals in the exhibits that the Kohnyo claim was located upon a discovery made in the tract north of the Mount Rosa placer and the location lines were run across the previously located placer and 700 feet beyond; that application for the placer was first made and, no protest or adverse being filed by the Kohnyo claimant, patent issued for the placer, including the area in conflict; that thereafter application was made for patent for the Fortuna and Kohnyo lodes, the area in conflict with the patented placer *being excluded in the application, publication and entry* (R., p. 28): and that the discovery and all improvements made by the Kohnyo claimant were upon the northerly tract with no showing that the lode had been discovered in the placer or in the Southerly tract. Under such circumstances the allowance of entry for the Kohnyo lode, including the Southerly 700 feet segregated from the discovery by the patented placer, was clearly unwarranted and upon the face of the application papers the

entry was necessarily invalid as to that Southerly 700 feet tract, and the Commissioner of the General Land Office promptly so held (Ex. A, R., p. 24).

The Land Department holds that a location and entry may include tracts segregated by a patented millsite or agricultural entry, if it be shown that the applicant has discovered the lode in both of the segregated tracts, which doctrine would no doubt apply to a case of segregation by a placer; but in the absence of a showing of discovery by the applicant in the disconnected tract the location and entry can be valid only to the extent of the tract where discovery and improvements are shown.

It follows then that the Kohnyo entry was, upon the face of the application papers, invalid as to the southerly 700 feet tract, and had been so held by the decision of the Commissioner of May 28, 1895 (Ex. A, R., p. 24), which was declared by the Secretary in decision of June 3, 1898, 28 L. D., 451-454, *to have become final* by failure of the claimant to appeal.

[The effect of the proceedings in the Land Department subsequent to May 28, 1895, is considered hereinafter.]

VI.

The Kohnyo entry, as to the South 700 feet thereof, if not invalid, was eliminated at the expiration of sixty days from notice of Commissioner's decision of May 28, 1895 (Ex. A, R., p. 24), which was a direction to the local officers to cancel the Kohnyo entry as to the South 700 feet thereof upon default by the claimant in making election and furnishing evidence as therein allowed or taking appeal.

This decision was self-executing. No election pursuant thereto was made and no appeal therefrom taken within the time limited. It was a final adjudication that the Kohnyo claim was not valid as to the part thereof separated from the discovery shaft by the patented placer. It is to be presumed that the local officers promptly notified the claimant, yet no action was taken until August 14, 1895, when the local officers forwarded a petition asking that the claimant be allowed to make application for the area in conflict with the placer. It is to be presumed that in the meantime the local officers had noted the cancellation upon their register of mineral entries, though whether or not such entry was made is immaterial.

Notwithstanding the suggestion in Commissioner's decision of January 8, 1896 (Ex. C, R., p. 29) that, by office letter of September 16, 1895 (Ex. B, R., p. 25), the decision of May 28, 1895, was modified so as to allow a hearing to determine whether the Kohnyo lode was known within the placer at the time of placer application, the petition forwarded August 14, 1895, must be regarded as an application for reinstatement and amendment to include the area in conflict with the placer, and the decision of September 15, 1895, as the allowance of a hearing to establish the alleged fact upon which such application was based. That this was the view of the Department is evidenced by the language of the Secretary in decision of June 23, 1899 (28 L. D., 451):

"There was no appeal from the decision of your office dated May 28, 1895, holding that by reason of their non-contiguity the two parts of the Kohnyo claim could not be embraced in the entry, nor was the question as to the soundness of that decision raised in the appeal from your

office decision of October 22, 1897, nor was it considered by the Department in its decision of May 7, 1898. The question considered and decided in those decisions was whether the Kohnyo vein was known to exist in the ground in conflict between the Kohnyo and the Mount Rosa placer locations at the time of the placer application for patent. There is, therefore, nothing in the decision of May 7, 1898, which the Department is called upon to review. What is really presented by the petition in question is an application for the reinstatement of the said entry. The Department is, in effect, asked to overrule your office decision of May 28, 1895, and restore the entry to its original status. This would be an unusual proceeding, for which no warrant is found in the existing situation. An application for reinstatement of the said entry, if made at all, should be presented to your office."

In a similar case (*Guillery v. Buller*, 24 L. D., 209) the Secretary said:

"As heretofore shown, your office held that the land in question was reserved from entry until the filing of Vidrine's relinquishment on March 3, 1894. This was error. Any rights that Vidrine may have had, ceased upon his failure to appeal from your office decision of July 27, 1893, or to change his entry in accordance with the instruction contained therein. He had sixty days within which to comply with the terms of said decision. Upon his failure to do so, the said decision became a final judgment and the land thereby became subject to entry by the first legal applicant. Within that time and to that extent, your office was correct in holding that the land was not subject to entry and that applications made within that time should have been rejected. It will be observed that Guillery's application was filed September 1, 1893, which was prior to the expiration of the time allowed Vidrine by your office decision to exercise his alternative right of appeal or to change his entry, which said decision, did not

of necessity become a final judgment until the expiration of sixty days from the date it was rendered. Guillory never renewed his application. Buller's application was filed November 6, 1893, after the expiration of the sixty days, when the judgment of your office had become final, and the land thereby released from any rights Vidrine may have had, and subject to entry ; hence the application of Buller to enter the land having been made after it became subject to entry, his rights are superior to those of Guillory."

* * * * *

"It has been determined that your decision of July 27, 1893, was a judgment of cancellation, which became final upon Vidrine's failure to appeal within the time allowed."

* * * * *

"In support of the holding that your office decision of July 27, 1893, was a judgment of cancellation, it will be observed that by said decision Vidrine was served with notice of what he might expect from your office. He was presented with the alternative of changing his adjoining farm entry to a settlement entry, to be followed by residence and cultivation sufficient to make a five years' showing ; or in the event of his failure to do this, or to appeal from your said decision, he was informed that proper steps would be taken looking to the cancellation of his entry. Vidrine took no action. The language of your said office decision is construed to be equivalent to a judgment holding Vidrine's entry for cancellation, unless within sixty days from notice he should comply with the requirements contained in said decision."

"Decisions of the Commissioner not appealed from within the period prescribed, become final and the case will be regularly closed." (Rule of Practice, Land Department, 112.)

In *Northern Pacific R. Co. v. DeLacey*, 174 U. S., 622, this Court said :

"The filing of their declaratory statement and the record made in pursuance of that filing, became without legal value if within the time prescribed by the statutes proper proof and payment were not made. Whether such proof and payment were made, would be a matter of record and if they were not so made, the original claim was canceled by operation of law and required no cancellation on the records of the land office to carry the forfeiture into effect. The law forfeited the right and canceled the entry just as effectually as if the fact were evidenced by an entry upon the record. The mere entry would not cause the forfeiture or the cancellation. It is the provision of law which makes the forfeiture and the entries on the record are a mere acknowledgment of law and have in and of themselves, if not authorized by the law, no effect. The law does not provide for such a cancellation before it is to take effect. The expiration of time is the most effective cancellation."

These declarations of the rule of departmental practice seem to remove any doubt as to the finality of the decision of May 28, 1895, and demonstrate that the petition of August 14, 1895, was in effect an application for reinstatement and amendment,

Under the practice of the Land Department, as a matter of policy tending to regularity and avoidance of confusion, applications or entries by others, pending adjudication of an application for reinstatement, are not accepted or allowed ; but before reinstatement of a mineral entry is permitted the applicant is required to republish so as to afford other claimants opportunity to file adverse claims and institute adverse suits, as is evidenced by the language of the Secretary in 28 L. D., following that quoted above (p. 454):

"It appearing that parties are claiming the ground covered by the canceled portion of the entry, adversely to the claim of the petitioner, and that such parties are entitled to be heard upon any application for the reinstatement of the entry, you are directed to advise the petitioner that your office will consider such application if filed in the local office within sixty days from notice hereof, provided notice of the application is published for the period of sixty days, commencing with the filing of the application, in the same manner as notice of original applications for patent is required to be published, and due proof of such notice is furnished."

And in such case the application for reinstatement takes effect as of the date formal application is made to the register of the local office for republication of notice

Upon this point the Secretary has recently said, as noticed before (*Jaw Bone Lode v. Damon Placer*, 34 L. D., 72, at 76):

"An application for mineral patent which has thus been rejected may, then, unless in itself or for any extrinsic reason fatally defective, be made the instrument of renewed patent proceedings. In any such case, however, it must be treated as refiled (and should be so endorsed by the register), and as again taking effect, as of the date formal application is made to that officer for republication of notice thereof, which must in all cases be promptly had. Where in any case that date can not afterwards be ascertained the application must of necessity be held to have taken renewed effect as of the date of the first publication of the new notice."

It is thus apparent that the land department recognizes the right of others to initiate rights by location pending an application for reinstatement of a mineral entry and makes provision for the protection of such rights by requiring the applicant, in case he show facts which, in the absence of

intervening adverse right, would entitle him to reinstatement of his entry, to republish notice or his application.

So, here, had the Kohnyo claimant established the basic fact of its application of August 14, 1895, for reinstatement and amendment, viz: The existence of the lode within the placer, the department would have required it to republish so as to give opportunity to claimants of intervening rights to adverse.

It follows, then, that the pendency of the contest with the Mount Rosa owner over the existence of the lode within the placer, could not under any theory prevent the initiation of possessory rights by location; and Gurney is estopped from insisting that an application for reinstatement reserves the land from mining location, for such contention applied to his main contention that the filing of Exhibit H eliminated the ground in question from the Kohnyo location and entry, would throw him out of court inasmuch as the petition filed June 17, 1898 (Ex. K, R., p. 58), asking to be allowed to patent both parts of the Kohnyo claim was in effect an application for reinstatement (if the relinquishment was effective as he claims), and was pending when his location was made on June 23, 1898.

VII.

If it be held that the operation of the decision of May 28, 1895, was suspended by the proceedings upon the petition forwarded August 14, 1895, and the Kohnyo entry remained unanceled pending those proceedings, such suspension was removed by the decision of the Secretary May 7, 1898 (Ex. G, R., p. 45), which finally disposed of the petition.

It is to be observed that the time limited in the decision of May 28, 1895, had long expired when the petition of August 14, 1895, was filed, so that that decision then stood as a judgment of cancellation and the suspension, if any, could only apply to the actual entry of cancellation upon the records, if such entry had not already been made. Under the rules of the Land Department a decision takes effect at once and is not in suspense pending the time for appeal or review and during such time entries are received subject to the right of appeal or review. Instructions, 3 L. D., 119; John H. Reed, 6 L. D., 563; Henry Gauger, 10 L. D., 221; Thomas *v.* Rathbun, 12 L. D., 243; Perrot *v.* Connick, 13 L. D., 598; Vradenburg *v.* Orr, 16 L. D., 35.

No motion for review of the decision of May 7, 1898, having been filed, it follows that that decision was final and continued effective from the time it was rendered.

As the time limited in Commissioner's decision of May 28, 1895, had expired, final action by the Secretary could not operate to start a new period of sixty days at the expiration of which cancellation would become effective.

VIII.

If the Kohnyo entry as to the Southerly 700 feet be held to have remained subsisting after May 7, 1898, it was not eliminated by the paper (Ex. H, R., p. 51), filed June 14, 1898.

We base this contention upon five grounds:

First. A mineral entry is not eliminated by the filing of a relinquishment.

This was the law with respect to all classes of entries

prior to the act of May 14, 1880 (21 Stat., 140). In cases of relinquishment, if acceptable to the Department, the entry was canceled by formal order. See, for illustration, Circular of May 3, 1876, 3 Copp's Land Owner, 38; *Sherman v. Atkins*, 4 Ibid. 21; *Barrett v. Maybury*, 4 Ibid. 77.

The act of 1880, entitled "An Act for the relief of Settlers on public lands," recognized the inconvenience of the delay in departmental routine between filing of relinquishment and cancellation pursuant thereto, in pre-emption, homestead and timber culture cases, and provided:

"That when a *preemption homestead, or timber culture* claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

We cite this statute as evidence that Congress recognized the law as enforced in the land department and saw fit to modify it only with respect to settlement entries, leaving it still in force otherwise. And that this rule was applied to the Kohnyo entry is evidenced by the fact that the Commissioner ignored the paper in question and by letter of June 27, 1898, (R., p. 58) closed the case and then proceeded to cancel the Kohnyo entry as to the Southerly 700 feet thereof by way of execution of the decision of May 28, 1895, and the Secretary in decision of June 3, 1899, 28 L. D., 451, at page 454, refers to the Kohnyo entry as *canceled* as to the said Southerly tract thereof.

A mineral entry, if regarded as a concluded transaction

and transfer of the equitable title (which is essential to Gurney's contention) is in effect a contract of purchase and sale whereby the government receives the price of its land and issues to the purchaser a certificate entitling him to patent if all be found regular.

It is too elementary for argument that in such case the purchaser cannot rescind the transaction and entitle himself to repayment of his purchase money without the acquiescence of the seller.

A relinquishment, therefore, can be no more than an offer of, or request for, rescision of the sale, and such rescision, if agreeable to the land department, is evidenced and effected by formal cancellation of the entry.

Second. The said paper (Ex. H.) was not the act of the corporation claimant.

It is elementary that the president of a corporation has no power to relinquish or quit claim property rights of the corporation and that such a relinquishment must be evidenced, at least, by the corporate seal, if not by a resolution of the Board of Directors. It is also elementary that agency cannot be established by declarations of the alleged agent. So far as appears in the paper itself or elsewhere in the record, this paper was the individual act of Lyman B. Goff, who claims to be the duly empowered president of the corporation. But there is no evidence of his official character or that he was empowered to make such relinquishment. On the contrary, it appears that three days later the attorneys of record for the company filed a petition still insisting upon the right to patent the South 700 feet of the Kohnyo claim and asking that action upon the paper filed June 14, 1898, be suspended.

Rule 104 of the Rules of Practice of the Land Department provides :

"In all cases, contested or *ex parte*, where the parties in interest are represented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients."

Third. The paper in question is not in terms or effect a relinquishment, but merely a waiver of the right to apply for review of the Secretary's decision of May 7, 1898

As we have shown, a decision of the Land Department is not suspended during the period for filing motion for review and, therefore, the decision of May 7, 1898, was effective from its rendition and waiver of the right to apply for review could in no wise perform any function in giving that decision force.

Nor was there, with respect to the 700 feet tract, anything to relinquish. The decision of May 28, 1895, became final by failure to appeal and the Secretary's decision of May 7, 1898, foreclosed the effort to reinstate and amend.

On June 14, 1898, therefore, the Kohnyo claimant had no right to patent for the said 700 feet tract which it could relinquish, but the entry stood finally adjudicated invalid as to that tract and there was nothing left for the claimant but to take what the Land Department would give, viz : patent for the ground north of the placer.

These considerations make it plain that the alleged election to receive patent for the said Northerly tract fulfilled no office, either as furnishing the basis for departmental action or divesting the claimant of any right to patent for the 700 feet tract.

And it is to be observed, again, that this was the view

taken by the land department, for the Commissioner ignores this paper and proceeds to close the case, so far as the 700 feet tract is concerned, as if no such paper had been filed.

The court below held this paper to be two-fold in effect—first, relinquishment of the entry; and, second, abandonment of possessory title.

But even the claimant's attorneys of record appreciated the rule of law that action upon the paper was necessary, assuming it to be an election pursuant to the decision of May 28, 1895; for, as we have shown, in the petition filed by them on June 17, 1898, they ask that action upon it be suspended pending consideration of their application to be allowed to patent both of the detached tracts.

In view of the decision in *Lavagnino v. Uhlig, supra*, which overrules the theory of the court below with respect to location upon ground covered by a prior location, it is unnecessary to consider the effect of the filing of the paper of June 14, 1898, upon the possessory title; but, far from being evidence of abandonment of claim either to patent or possessory title, it is an assertion of ownership of the whole Kohnyo claim—note the introduction “which company *is the owner of* the Kohnyo and Fortuna lode mining claims”—and amounted only to submission to the inevitable so far as the patent proceedings were concerned.

The deduction of the court below, that this paper was abandonment of possessory claim, is unaccountable in the face of its frequent declarations that failure of patent proceedings does not affect the possessory title, upon which point the case of *Clipper Mining Company v. Eli Mining Company (supra)* is now conclusive, and in the face of the continued applications of the claimant claiming the right

to patent for the said 700 feet tract, until July 18, 1899, when the attorneys of record formally waived all claim to reinstatement (R., p. 56).

Fourth. The paper filed June 14, 1898, even assuming it to be the act of the company, was, in effect, withdrawn by the petition filed three days later praying that the claimant be allowed to patent both of the detached parts of the Kohno claim (R., p. 58) and asking for suspension of action upon the said paper pending consideration of such petition (28 L. D., 452).

Fifth. And, finally, the land department ignored the paper in question and the Commissioner, on July 15, 1898, entered the final order (Ex. K R., p. 57), which was merely a superfluous confirmation of the cancellation of the Kohno entry as to the Southerly 700 feet tract which took effect at the expiration of sixty days from notice of the decision of May 28, 1895.

If the action of July 15, 1898, was regarded by the Commissioner as necessary to eliminate the Southerly 700 feet tract from the Kohno entry, it is clear that he was laboring under a misapprehension of the effect of his decision of May 28, 1895, and any such view entertained by the Commissioner must be held to be overruled by the final authority of the Department, the Secretary, who, as we have shown, declared the decision of May 28, 1895, final and in no wise involved in the proceedings upon the application to include in the Kohno application the ground in conflict with the placer.

As Gurney depends wholly upon the location made June 23, 1898, his contention falls with the paper of June 14, 1898, and if the validity of location depends upon the continued existence and final elimination of the Kohnyo entry as to the Southerly tract thereof after June 23, 1898, the contest is reduced to one between Brown and Small.

As we have shown, the proceedings upon the petition of August 14, 1895, were closed by Commissioner's letter of June 27, 1898 (R., p. 58), notifying the local officers that Secretary's decision of May 7, 1898, had become final, and if that date (June 27, 1898), be taken as the time of elimination of the Southerly tract from the Kohnyo entry and validity of location depends upon making location thereafter, Brown is prior to Small by reason of the amended location made July 15, 1898.

And if it be held that the Kohnyo entry existed as to the tract in question, until July 15, 1898, when the Commissioner made the formal, though superfluous, declaration of cancellation, and that valid location could be made only thereafter, Brown is still superior to Small by reason of the amended locations made July 15 and 16, 1898.

Small being plaintiff, the burden was upon him to show priority and superiority over Brown and, with respect to the locations made on July 16, 1898, in the absence of evidence that Small's location was made before Brown's Brown's must prevail.

But with respect to Small, we likewise rely upon the fundamental principles hereinbefore invoked (subdivisions III and IV), that the pendency of the Kohnyo entry proceedings was not a bar to location of the ground in ques-

tion, and that it is immaterial when the ground in question was eliminated from the Kohnyo entry, as well as the contentions in subdivisions I and II.

We submit that the judgment of the supreme court of Colorado must be reversed in both cases, with direction to affirm the judgments of the trial court in favor of Brown.

Respectfully submitted,

WILLIAM C. PRENTISS,
Attorney for Frank Cole Brown.

CHARLES F. POTTER,
HORACE F. CLARK,
Of Counsel,

FILE COPY.

Office Supreme Court U. S.
FILED

DEC 4 1905

JAMES W. MCINNEY,
Clerk.

(19,489.)

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1905.

NO. 97.

FRANK COLE BROWN,

Plaintiff in Error.

VS.

CHARLES DUNCAN GURNEY,

Defendant in Error.

*In Error to the Su-
preme Court of the
State of Colorado.*

**BRIEF ON BEHALF OF DEFENDANT
IN ERROR.**

CHARLES C. BUTLER,

Attorney for Defendant in Error.

Bi-Metallic Bank Building,

Cripple Creek, Colorado.

November 17, 1905.

(19,469.)
IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1905.

NO. 97.

FRANK COLE BROWN,

Plaintiff in Error,

VS.

CHARLES DUNCAN GURNEY,

Defendant in Error.

*In Error to the Su-
preme Court of the
State of Colorado.*

**BRIEF ON BEHALF OF DEFENDANT
IN ERROR.**

On the occasion of the hearing of this case in the Supreme Court of the State of Colorado, Mr. Charles Duncan Gurney, defendant in error herein, was represented by the Honorable J. C. Helm,

who for many years was a justice of the Supreme Court of that state, and by Mr. Charles C. Butler.

The following briefs were prepared by Judge Helm and filed on behalf of this defendant in error in the Supreme Court of Colorado, and as no additional arguments suggest themselves to present counsel, the defendant in error will rely, on the hearing of the case in this court, upon Judge Helm's briefs.

This brief will consist of two parts. Part I contains Judge Helm's opening brief, and Part II his reply brief. We have not been favored with a copy of the brief of plaintiff in error to be filed in this court, but we presume that the argument will be practically the same as that contained in the answering brief filed in the State court, and that argument is considered and refuted in Judge Helm's reply brief.

In the opening brief we have changed the titles of the parties so as to correspond with their titles in this court, namely "Plaintiff in Error" and "Defendant in Error;" but in the reply brief it was impracticable to make such change, and we therefore leave it just as it is and offer it in reply to the argument that will undoubtedly be made by plaintiff in error.

The abstract referred to herein is the abstract filed in this court.

PART I.

This cause was tried to the district court without a jury; a jury being expressly waived by agreement of the parties. The findings or reasons of the trial court, if findings were made or reasons given by him, were not preserved and are not incorporated into the record. The writer of this brief was not present when the decision was rendered and is, therefore, not advised upon what grounds the learned Judge based his conclusions. Hence, in this opening argument, the case will be presented and the authorities reviewed from the standpoint of defendant in error exclusively. Doubtless counsel for plaintiff in error will develop in his brief the grounds upon which the court below based his view of the controversy, and will likewise cite the authorities upon which he and they relied. Such grounds, together with the authorities that may be referred to, will, of course, receive careful and thorough consideration in our reply to the argument on behalf of plaintiff in error.

While the case involves some nice questions of law, these questions are not complicated by disputed questions of fact and are unusually free from embarrassment; we do not apprehend that this Honorable Court will encounter much difficulty in reaching a satisfactory conclusion upon the merits.

There is no controversy concerning the facts; they appear in the record in the form of a stipulation agreed to by all the parties. This stipulation

will be found in the abstract beginning at page 18 and extending through to page 24. Accompanying the stipulation are exhibits representing the various proceedings, decisions, and orders of the Land Department upon which the stipulation is based; those exhibits begin at page 24 and comprise nearly all the rest of the abstract. The essence of the controversy as thus appearing may be briefly stated as follows:

I.

STATEMENT OF THE CASE.

The suit was brought by defendant in error on behalf of the Hobson's Choice mining location against plaintiff in error representing the Scorpion mining location in support of an adverse duly filed in the U. S. Land Office. Incidentally another suit is consolidated with the one above mentioned, in which one Small on behalf of the P. & G. lode location likewise sues plaintiff in error, representing the Scorpion. The latter action is also an adverse proceeding. The reason for consolidating the cases, or rather for trying them together, is made clear from the stipulated facts; the causes being submitted upon an agreed statement signed by counsel for all the parties.

As will be seen by turning to this statement of facts, no controversy exists concerning the performance of all the acts required by law in making a mining location on behalf of each of said claims; that is to say, it is admitted that the Scorpion, the

Hobson's Choice and the P. & G. locations were all made in full compliance with law in all respects *save one*. It is also admitted that since the location, the annual assessment work has been done on behalf of each, and no actual forfeiture or abandonment by either has taken place.

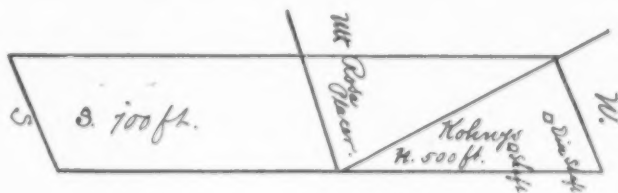
The three locations described, cover substantially the same tract of ground. The one exception above mentioned touching the validity of the respective locations, relates to the question as to whether or not at the time of these locations the territory covered thereby was *unappropriated public domain*. This exception will be found referred to in the statement, and repeated in connection with each of said locations in the following language: "*Provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain.*"

THE KOHNYO LOCATION.

It appears that prior to the 28th day of May, 1895, a mining lode location called the Kohnyo was owned by The Cripple Creek Mining Company. The Kohnyo claim was segregated into two disconnected tracts by the Mt. Rosa patented placer claim; the Kohnyo being located across one corner of this placer; the Kohnyo did not adverse the placer patent application. The north end of the Kohnyo, comprising five hundred feet of the claim, was where the discovery of mineral was made; it also contained the discovery shaft

and the other workings and improvements of the claim. The segregated south end being seven hundred feet in length did not show mineral, and was without development work of any kind.

The following rude diagram illustrates with sufficient accuracy the Kohnyo claims together with the placer intersection. It shows the two segments into which the Kohnyo was divided by the placer conflict.



Upon application for patent of the Kohnyo, a receiver's receipt issued covering both of these segregated tracts. But the Land Department ultimately refused to issue a patent for said tracts, basing such refusal upon the ground that two disconnected portions of a lode mining claim, when thus separated by patented placer ground, could not be included *under one location* within the same patent from the Government. The commissioner of the General Land Office in making this ruling, however, gave the Cripple Creek

Company, applicant for patent, *the privilege of proceeding to patent upon either of the segregated tracts above described, at its election*; directing, however, that if the southerly tract of seven hundred feet were chosen, proof of mineral therein and expenditure of \$500 thereon should be furnished; sixty days were allowed for the furnishing of such evidence, or the taking of an appeal from the commissioner's decision.

The order or decision just mentioned, by the commissioner, was entered on the 28th of May, 1895. It further provided that in default of such an election or appeal by the claimant, the entry "will be canceled to the extent of that portion of the claim lying south of the Mt. Rosa placer claim, without further notice." As will be seen hereafter, the Kohnyo, after various intermediate proceedings, ultimately proceeded to patent for the north tract of five hundred feet, *having elected to retain that tract*. Thus the southerly tract of the Kohnyo of seven hundred feet being excluded from the Kohnyo patent, became subject to relocation, and as above stated, the three mining locations connected with the present controversy, to-wit: the Scorpion, Hobson's Choice, and P.& G., each undertook to secure this tract. The question before the trial court, and the one upon which this court's decision must turn is: *By virtue of what act or proceeding, and at what date did the southerly tract of the Kohnyo revert to and become a part of the public domain?*

We will endeavor in a moment to show the pertinancy and decisiveness of this question. But in order to do so, a brief outline of the decisions and rulings of the Land Department with reference to the Kohnyo location or claim, together with the acts and doings of the Kohnyo claimant in the patent proceedings, and also the acts of the parties to the present controversy, are necessary. The stipulation of facts is quite extended, but the matters and things that are essential to a decision are, in our judgment, comparatively few. The following are believed to be amply sufficient, and to cover everything that is material to the controversy.

VITAL PROCEEDINGS IN CHRONOLOGICAL ORDER.

May 28, 1895:

Decision of commissioner of Land Office declining to embrace in one patent both of the Kohnyo tracts, and directing claimant to make its election between such tracts. This decision is sufficiently described above and the description need not be repeated (Exhibit A, Abs., original p. 49, print p. 24).

May 7, 1898:

Decision by Secretary of the Interior in which the intervening proceedings whereby the Kohnyo claimant sought to set aside the order of May 28, 1895, were dismissed; the action of the local Land Office and commissioner in denying the relief

sought by the Kohnyo claimant being sustained; and the order of the commissioner of May 28, 1895, suspended by the intervening proceedings being restored to full force and effect (Exhibit G, Abs., original p. 89, print page 45).

May 13, 1898:

Location by plaintiff in error Brown of the southerly seven hundred foot tract of Kohnyo, as the Scorpion Lode claim.

June 14, 1898:

The filing in the Land Office by The Cripple Creek Mining Company, the Kohnyo claimant, of an instrument of writing dated June 10, 1898, in which it elects to retain and patent the north end of the Kohnyo claim; and in which it also waives any right of further questioning or reviewing the decision of the Secretary of the Interior of May 7, 1898; affirming the decision of the commissioner of the General Land Office of May 28, 1895 (Exhibit H, Abs., original p. 101, print p. 51).

June 23, 1898:

Location of the Hobson's Choice lode claim by defendant in error Gurney, embracing the southerly seven hundred foot tract of the Kohnyo claim.

July 15, 1898:

Formal cancellation by the commissioner of the receiver's receipt previously issued to the Kohnyo claimant, in so far as said receipt covered or affected the said southerly seven hundred foot

tract of the Kohnyo claim (Exhibit K, Abs., original p. 113, print p. 57).

July 16, 1898:

Location by J. A. Small of the P. & G. lode claim, likewise covering the said southerly seven hundred foot tract of the Kohnyo.

July 15 and 16, 1898:

Filing of amended and second amended location certificates of the Scorpion claim.

EXHIBITS BELIEVED TO BE IMMATERIAL.

After the decision of the commissioner above mentioned, rendered on May 28, 1895, no appeal was taken; but The Cripple Creek Gold Mining Company, owner of the Kohnyo claim instituted proceedings against The Mt. Rosa M. M. & L. Company, owner of the Mt. Rosa placer, and one McConaghy, assignee, to re-open the matter and secure title to the lode, through the territory in conflict between that claim and the placer, and thus to unite and patent both of the segregated tracts of the Kohnyo; the position being taken and strenuously urged that at the time of the placer application for patent, the Kohnyo vein was known to exist in this conflicting territory; therefore that, under the law, the placer patent did not cover or include this vein; that, on the contrary, by virtue of the statute, the vein was excluded from the patent, remaining subject to location, and was duly covered by the Kohnyo location. These proceed-

ings are represented in the record by Exhibits "B," "C," "D," "E" and "F." (See Abstract original, pages 51 to 74, print pages 25 to 37.) The position of the Kohnyo claimant in this regard was overruled throughout; the Land Department holding, upon proofs, that the existence of the Kohnyo vein in the conflict territory was not known at the time of the placer application for patent.

These proceedings are concisely detailed in Exhibit "F." Their sole effect was to suspend the operation of the commissioner's decision of May 28, 1895; so that it was only by the ruling of the Secretary, above mentioned, on May 7, 1898, deciding finally against the Kohnyo claimant's contention of a known vein in the placer conflict, that the said commissioner's order of May 28 again became operative.

Exhibits "I" and "J" (see Abstract original pages 102 to 108, print pages 52 to 55,) represent exclusively proceedings before the Land Department, wherein the correctness of the amended survey of the north 500 foot tract of the Kohnyo, ordered by the department *after the election* of the Kohnyo claimant to retain and patent said tract, was challenged. The ground of this challenge was that such amended survey conflicted with a mineral lode location known as the Hypatia. Obviously these latter proceedings have nothing whatever to do with the southerly 700 foot tract of the Kohnyo, and consequently are not material to the present controversy; hence, they will receive no further notice.

QUESTION AT ISSUE RESTATED.

From the foregoing, the court will at once gather the essence of the present controversy. If the southerly seven hundred foot tract of the Kohnyo claim reverted to and became a part of the public domain on May 7, 1898, immediately and by virtue of the decision of the Secretary of the Interior then rendered, the Scorpion location is valid, and in that event, the Scorpion being prior to the Hobson's Choice and P. & G. locations, plaintiff in error Brown was entitled to judgment in this case.

If, on the contrary, the said southerly seven hundred foot tract of the Kohnyo did not so revert on the said 7th of May, but did on June 14, 1898, the date of the filing in the Land Office of the Kohnyo claimant's election to retain the north five hundred feet of the Kohnyo, so revert to and become a part of the public domain, then the Hobson's Choice location should have won. The latter location being made on the 23d of June, 1898, preceded the P. & G. location in point of time, thus being the first location of the territory in controversy after it became a part of the public domain.

But if the southerly seven hundred foot tract of the Kohnyo did not become a part of the public domain either on the said 7th of May or on the said 14th of June, but did revert to the public domain on July 15, 1898, when the entry for patent therefor was formally canceled by the commis-

sioner, then the P. & G. location ought to have prevailed. Since, in that event, both the Scorpion and Hobson's Choice locations would have been premature, and not upon the public domain, they would be consequently invalid. And the P. & G. location made on the 16th of July, 1898, would be the first legal re-occupancy and appropriation of this tract.

A careful study of the facts, together with the law involved, satisfies us that the Hobson's Choice location made on the 23rd day of June, 1898, was rightful, and that defendant in error Gurney, representing this claim, ought to have succeeded in the present action. We believe that under the law the southerly seven hundred foot tract of the Kohnyo reverted to and became a part of the public domain either on the 10th of June, when the election of the Kohnyo claimant to take the northerly five hundred foot tract was written and signed, or on the 14th day of June, when that election was filed in the Land Office. And we will now proceed to demonstrate to the best of our ability the foundation of our faith in the premises.

II.

ARGUMENT AND AUTHORITIES.

We ought, perhaps, to preface at this point with a reference to the possible bearing upon the present case of the Federal statute of 1881, to the effect that if neither party to the adverse suit establishes his right, neither shall recover. Mor-

ri-son's Mining Rights, (9th Ed. 425.) By virtue of this statute in adverse suits the verdict and judgment may be against both parties. Therefore, if the Scorpion location made by plaintiff in error Brown was premature—that is to say, was begun while the territory involved was still covered by the Kohnyo location, and was not a part of the public domain, then defendant in error Gurney must succeed to the extent of defeating the Scorpion application for patent. As to whether or not Gurney, representing the Hobson's Choice location, or Small, representing the P. & G. location, or either of them, would in such case be entitled to a judgment depends of course upon the question as to which of these locations is legal; they cannot both be valid. If the territory was public domain when the Hobson's Choice was located, it follows necessarily that the P. & G. location is void. If the land was not public domain when the Hobson's Choice was located, then the question recurs, was it public domain when the P. & G. location was made. We say this question recurs, for the reason that it does not follow that if the Scorpion and Hobson's Choice are invalid, the P. & G. is necessarily valid; for if the court should find that the southerly 700 feet of the Kohnyo did not revert to and become a part of the public domain upon the cancellation of the receiver's receipt in connection therewith, and that this effect had not followed either of the previous orders or proceedings, then under the statute of

1881, neither would the judgment go in this case for the P. & G. location.

**FIRST. SCORPION LOCATION, PREMATURE
AND INVALID.**

As already observed, the attempted location of the Scorpion claim made on the 13th day of May, 1898, was in our judgment invalid. At that time the southerly 700 foot tract of the Kohnyo had not become a part of the public domain, and therefore was not subject to relocation.

It will be remembered that the owner of the Kohnyo undertook to have the commissioner's decision of the 28th day of May, 1895, reversed or modified; that it instituted certain proceedings against The Mt. Rosa M. M. & L. Company to show that the Kohnyo vein did not pass to that company by the placer patent, and consequently that the Kohnyo claim was valid from end to end. A number of hearings and orders took place in connection with these proceedings; but, as above stated, it is unnecessary to consider them here for the reason that they accomplish nothing save to suspend the commissioner's decision of May 28, 1895; that decision being ultimately confirmed in all respects by the decision of the Secretary of the Interior of May 7, 1898.

The result therefore of the decision of the Secretary of Interior on May 7, 1898, *was to restore operative effect to the commissioner's decision and order of May 28, 1895;* which had been sus-

pending pending all of the said various intervening proceedings.

Hence, on the 7th day of May, 1898, the decision and order of the commissioner of May 28, 1895, again became operative and effective, and the situation was precisely the same as if this decision had been rendered on the latter date, to-wit, May 7, 1898. It becomes necessary, therefore, for us to briefly analyze the commissioner's order of May 28, 1895, and determine its force and effect. *Did this order itself operate so as to at once restore the south 700 foot tract of the Kohnyo to the public domain? If it did not, then the Scorpion's attempted location made six days after the secretary's decision, and on the 13th day of May, was invalid.*

1st. Commissioner's decision of May 28th considered.

The decision of May 28, 1895, did not itself vacate or purport to vacate, the original location of the Kohnyo claim as to the southerly 700 foot tract thereof; nor did it in and of itself produce any immediate impairment of that location in relation thereto. As already observed, this decision simply declared that a patent could not issue covering both of the segregated tracts of the Kohnyo. *It gave the Kohnyo claimant permission to select either one of those tracts, and take his patent therefor.* Under this order he retained the right to choose the southerly 700 foot tract if he so desired, the condition being that if he chose this tract, he must within sixty days furnish evidence of mineral and

of \$500 worth of work thereon; it also contained the additional declaration that if the Kohnyo claimant failed to make its election and determine upon which one of the segregated portions of the claim it would proceed to patent, such inaction would result in a cancellation of its patent entry as to the southerly 700 foot tract.

Thus we observe with reference to the decision of May 28th, that the Kohnyo location was not immediately avoided as to the southerly 700 foot tract; *and that the effect of this decision was to leave that tract still covered and protected by the original location.* The Kohnyo claimant had the privilege at any time before the cancellation of the entry, of selecting and retaining and patenting this tract; and if it did not choose to make any election in the premises, the result was that at the end of the sixty days, the entry would be canceled as to this portion of the claim. *Thus the interest of the Kohnyo claimant under its location, in the south 700 feet of the Kohnyo could be terminated in either of two ways, viz: by election to patent the north 500 feet, or by silence, (a failure to elect,) which the land department would, at the end of sixty days, construe to be a waiver of all right thereto.*

2nd. Election by Kohnyo claimant made on June 14, 1898.

But according to the record, the Kohnyo applicant did make an affirmative election in the premises. This election was evidenced by the

filing on the 14th of June, 1898, less than thirty days after the order of May 28, 1895, again became operative, of an instrument dated four days earlier, selecting the northerly 500 foot tract of the Kohnyo to be retained and patented; and expressly waiving all right to any further objection or review of the order of May 28, 1895, and decision of May 7, 1898. (Exhibit H, Abs., original p. 101, print p. 51).

Prior to the 14th of June, 1898, the southerly 700 foot tract of the Kohnyo had not reverted to the public domain, and become subject to relocation. For prior to that date the Kohnyo claimant had not expressed his desire or intention under the order of May 28, 1895, which order, as we have seen, became again operative on May 7, 1898. Until the 14th of June, 1898, when the election was filed—that is to say, *on any day or at any hour prior thereto, The Cripple Creek Company could have elected to retain and patent this 700 feet; and so long as this privilege remained, the tract unquestionably continued to be within and protected by the Kohnyo location. It was no more subject to location or to re-location than was the northerly segregated tract of 500 feet also belonging to said claim, upon which the Kohnyo claimant actually went to patent.* Had the Kohnyo claimant chosen so to do, it might on the 14th of June have elected to give up the northerly 500 foot tract, and have gone to patent upon the southerly 700 foot tract. Or it might have refrained from making any election,

and allowed the entry to be canceled as to the southerly tract.

We might dwell longer upon this subject, and perhaps by illustration and argument develop more fully our conclusion. But we deem further argument in this respect unnecessary. It necessarily and irresistibly follows from the foregoing *that appellee's attempted location of the south 700 foot tract on the 13th of May, 1898, was of no more validity or effect than if he had at that time attempted to locate the said north 500 foot tract of the Kohnyo.* The validity of the Kohnyo location is conceded, *no forfeiture thereof for failure to do annual assessment work is shown*, and the mantle of this location continued to cover both of the segregated tracts of the Kohnyo claim until, as we have seen, The Cripple Creek Company made its election to retain the north 500 feet and abandon the south 700 feet. The attempted location of the Scorpion by Brown was thus made *some twenty-eight days before the territory covered thereby became, or could have become, a part of the public domain.*

3rd. *The rule of law involved in present discussion.*

It is hardly necessary for us in this connection to state the rule of law upon which the foregoing and following discussions are based, or to cite authorities in support thereof; this rule or principle is very familiar to all mining lawyers; it has been frequently announced in Colorado.

"Only the unoccupied and unappropri-

ated mineral lands of the general government are subject to exploration and location. * * * To perfect a valid location the prospector must discover a vein or lode upon the *unoccupied and unappropriated public domain*; he must then perform certain acts, among which is the sinking of his discovery shaft within the limits of the territory which he has a right to appropriate."

Armstrong vs. Lower, 6 Colo. 393, 395.

"The discovery shaft must be sunk upon unoccupied public land; that is to say, it must be outside of the lines of any patent or even of any valid location."

Morrison's Mining Rights, (9th Ed.)
page 33.

Authorities to the foregoing effect can, of course, be indefinitely multiplied. The attempt to make a location upon territory that is at the time embraced within a prior, valid and subsisting location is void; the prospector is guilty of a trespass, even when he goes upon such a subsisting location for the purpose of making his discovery, and every subsequent act by him in attempting to perfect a location, is an additional trespass; moreover, where the attempted location is invalid upon this ground, the same cannot be perfected or rendered valid by the subsequent filing of an amended location certificate or the doing of any acts short of a complete relocation.

We therefore conclude that the "Scorpion" location is out of the race, and that plaintiff in error

Brown ought not to prevail. The 700 foot tract covered by the "Scorpion" was at the time of the attempted Scorpion location, included within a valid and subsisting location. And every one of plaintiff in error's acts constituted a trespass. Nor did the subsequent filing of either or both of his amended location certificates in any manner cure or tend to cure the invalidity. For this conclusion with reference to the effect of those amended location certificates we suggest two good and sufficient reasons: *First*, that as above stated, a location void *ab initio*, cannot be cured or made valid by amendment; and, *second*, that, as we will now proceed to show, at the time of the filing of the amended "Scorpion" location certificates, defendant in error had, by means of the "Hobson's Choice" location, effectually re-segregated the territory from the public domain, and no subsequent act of plaintiff in error could possibly relate back so as to invalidate the "Hobson's Choice" location.

SECOND. HOBSON'S CHOICE LOCATION, VALID.

But the question remains as to which, the Hobson's Choice or the P. & G. location, is valid, and should have recovered in the court below; or as to whether either of these locations is valid and should have so recovered. We unhesitatingly assert that at the time the Hobson's Choice location was made, the territory in question had become a part of the public domain, and therefore this location was legal. The doctrine of abandonment

alone determines this question and settles it in favor of the Hobson's Choice.

1st. Distinction between abandonment and forfeiture.

At this juncture it is perhaps as well to distinguish between the doctrines of abandonment and forfeiture. With this distinction, the court is doubtless familiar. The two leading differences are that abandonment *rests upon intention*, and *takes effect instantly*; while forfeiture takes place *by operation of law*, and is not complete until some one else has attempted *to initiate a right* to the forfeited property. We may add that forfeitures are always looked upon with *disfavor* and are *never presumed*; while as to abandonment, no such rule applies. Says Mr. Lindley, in his work on mines, section 643:

"Abandonment is always a question of intention. In forfeiture the element of intent is not involved. It rests entirely upon a statute, and involves only the question whether the terms of the law have been complied with. Abandonment operates *instantly*. * * Forfeiture is not complete until someone else enters with intent to re-locate property." Citing numerous cases.

The locator or owner of a mining claim may undoubtedly abandon the same at any time prior to the issue of patent. There is no point of time at which he may not voluntarily give up all his rights to the property, prior to the actual transfer

of the fee by the patent itself. He may do this when his location is made, and before his application for patent; he may do it after his application for patent, and before issuance of his receiver's receipt; or he may surrender all his interest and rights under his location and his patent proceedings, after entry, and down to the actual issue of the patent itself. Concerning the correctness of these propositions, there can be no doubt. They are fully and clearly illustrated by numerous authorities.

A forfeiture *even* may take place after the entry of a mining claim. For instance, to insure absolute protection, the entryman should perform his annual labor after issue of the receiver's receipt; for if he does not, and, by reason of protest or otherwise, his entry is afterwards canceled, a forfeiture may take place. This is so because the Federal statute, section 2324, U. S. R. S. requires performance of such annual labor "until patent has been issued therefor." It is only by virtue of the *doctrine of relation* that an entryman is excused from performance of his annual work after entry. That is to say, it is only because the courts hold that the patent whenever issued, relates back to, and takes affect from the date of entry. But where for any reason the entry is canceled, and the patent does not issue, obviously this doctrine cannot apply, and does not prevent a forfeiture.

"Nevertheless, in such case (failure to perform annual labor after entry) a

party runs the risk of the consequences in case his receiver's receipt should be canceled."

Morrison's Mining Rights, 9th Ed. 76.

Swigart vs. Walker, 30 Pac. 162.

In Smuggler Co. vs. Trueworthy lode claim, 19 L. D., 356, a relocation of the Trueworthy claim was made after the entry; an order for cancellation of the entry existed. The Secretary of the Interior, referring thereto, employs the following language:

"During the period covered by the order holding said claim for cancellation, all intervening claims to the land were necessarily *subject to such rights as might be finally accorded the entryman*, either on review before your office, or on appeal before the Department; and a re-location of the land by an adverse claimant during said period would not give the re-locator such an interest as would entitle him to be heard *as against the right of the entryman*."

Thus the Land Department clearly recognizes the fact that a re-location of a mining claim may be made after entry, and before cancellation of the receiver's receipt, *under conditions that would warrant such re-location in the absence of entry*; a re-locator simply taking the hazard of the entry being ultimately sustained. That is, a forfeiture becomes operative as of the date of its occurrence, after cancellation of the entry. If acts or omissions occur after entry, that would result in the forfeiture of a located claim before entry for patent, and if

the entry is subsequently canceled and set aside, the re-location made during the interval and after the forfeiture acts, is not void, and it may ultimately become good. Say Barringer & Adams, in their work on mines and mining, at page 375:

"A mineral entry made during the existence of another entry for the same tract is irregular, but may be allowed to stand on cancellation of the previous entry."

2d. *Abandonment, not forfeiture, in the present case.*

But there was here no forfeiture, and the discussion and authorities on the subject of a forfeiture after entry, just referred to, do not in reality affect the present discussion. They are only introduced here for the purpose of showing that even as against forfeitures, which are never presumed and are always looked upon with disfavor, and which arise contrary to the owner's wish or intention, an entry for patent is not conclusive. But whatever the conclusion might be with reference to forfeitures, there can be no possible doubt with reference to abandonment. And we unhesitatingly assert that the action of The Cripple Creek Gold Mining Company, owner of the Kohnyo claim, in filing in the U. S. Land Office the written instrument on June 14, 1898, *was an abandonment* of the southerly 700 foot tract of that claim. We have already referred to, and sufficiently discussed the order or decision of the commissioner made on the 28th of May, 1895, in pursuance of which this action of the Cripple Creek Company was taken. It will

be remembered that by the said decision of May 28th, the Kohnyo claimant was given the privilege of electing which tract it would retain. Its action in making this election was *purely voluntary*. It could choose either tract, and by choosing voluntarily waive and abandon its right to the other tract; or it could remain silent, and if it remained silent, its interest in the south 700 feet would, at the end of sixty days, be treated as waived. Had it remained silent, there might have been more chance for discussion; though even then its silence would probably have been construed to be an abandonment.

Thus it is clear that the act of the Kohnyo claimant in making its election on the 14th of June, 1898, was purely voluntary. As to the effect of this action, there can hardly be different views. By electing to retain and patent the north 500 feet of the Kohnyo, the claimant effectively declared its intention to abandon the south 700 feet. The latter tract was thereby voluntarily excluded from the patent proceedings; it was discarded and the patent issued for the remainder. All rights of the Kohnyo claimant thereto then terminated. While a patent may issue covering two separate tracts of mineral land, yet, except in the instance hereinafter mentioned, each of those tracts *must be secured and evidenced by a separate location*. The election to retain the north 500 feet operated to exclude from the purview of the original Kohnyo *location* the south 700 feet. Moreover, this exclusion was

rendered all the more effective, and the restoration of the tract to the public domain was made all the more certain, by the fact that *the location acts including the discovery of mineral and the sinking of the discovery shaft, also the \$500 in work and all other improvements, were upon the north 500 feet so retained by the claimant.*

This court is familiar with the principle of law that the including of the discovery shaft in a patent issued to another, renders the original location invalid, and restores the territory to the public domain.

"Ever since the decision of the case of Gwillim vs. Donnellan, 115 U. S. 45, it has been the conceded and established law that if a locator permits an adjoining claimant to obtain a patent from the government for that portion of his territory which includes his discovery shaft, and he is without another which gives him a superior right as against the contesting claimant, he must be adjudged to have lost title to whatever territory is embraced within the limits of his claim. That case unquestionably decides, that if the locator permits the adjoining occupant to patent that part of his territory, it is the equivalent of an adjudication that he is without title, and the remaining part of *his location reverts to the condition of public lands*, and is open to location and purchase by other citizens and claimants, unless the locators in some legal fashion have initiated a new title."

Miller vs. Girard, 3 Colo. App. 278.

See also Gwillim vs. Donnellan, 115 U. S., 45, cited.

Barringer & Adams, 299.

In Re Adams Lode, 16 L. D., 233.

But if the patenting of a discovery shaft *by another*, operates to invalidate the location and restore the claim to the public domain, how much more is this true when the *party himself* patents a portion of his claim including his discovery shaft, omitting a portion formerly covered by his location. By this act he unquestionably relinquishes, and voluntarily gives up the part of his location excluded from his patent, and the portion so given up at once becomes a part of the public domain.

Where one goes to patent for a part of his claim, excluding the other portion from his patent, even though there be no formal relinquishment, as there is in this case, the portion thus omitted reverts to, and becomes a part of the public domain.

In Re Elijah Welsh et al., 4 L. D., 172, the parties were endeavoring to purchase certain lands previously excluded from their patents. After denying the application upon another ground, the acting Secretary of the Interior says:

"If further reason were necessary, it might be found in the facts that both applicants proved up and took patents for the residue of their respective entries after the elimination of the tracts in question. It might very properly be held that by so doing, in law, *they abandoned the tracts thus eliminated*, and surrendered whatever

of right they might otherwise have had in them."

The land referred to in the Welsh case was agricultural land, but that fact is of no significance; the rule would undoubtedly apply as well to mineral locations.

Thus we have *in the case at bar* three well recognized conditions under which territory reverts to the public domain and becomes subject to re-location, after having been segregated therefrom by a mining location, viz:

First. The voluntary abandonment of the south 700 foot tract by the claimant's election in writing, filed in the land office on the 14th of June, 1898; this alone operated to restore the tract to the public domain, and that result followed instantaneously.

Second. Had there been no such express and affirmative relinquishment the act of the Kohno claimant in excluding this tract from his patent, occurring at the same time would, in and of itself, have operated as an abandonment thereof.

Third. The act of said claimant in going to patent for that portion of his claim which included the discovery shaft would, also, in and of itself, alone, have operated to restore the remainder of the claim to the public domain; this result would have followed the patenting of his discovery shaft by another, and *a fortiori* it follows his own act in including the discovery shaft within a patent issued to himself.

3d. Rule where one of two conflicting lode claims goes to patent, not applicable.

We are aware of the fact that where *two lode claims* conflict, a party has been allowed to proceed to patent for the segregated portions of one of them without waiver of his rights to the portion in conflict.

Black Queen vs. Excelsior, 22 L. D., 343.

Branagan vs. Dulany, 2 L. D., 744.

The correctness of even that ruling has been challenged, and is today seriously doubted, although its recognition has been finally restored by the Department. But this rule is only applied where a controversy exists and *adverse suit is actually pending* between the two conflicting lode claims. Moreover, in such a case, the patentee *expressly declares in the Land Office that he does not abandon the conflicting territory; on the contrary, he proceeds with the clear and express declaration and understanding that he retains his right to contest with the conflicting claimant, the ownership of this tract*. Again, in that case, the presumption announced in *Armstrong vs. Lower*, 6 Colo., and other cases, that the vein extends throughout the claim, is indulged, and is a very important consideration. But in the case at bar, no such presumption exists. The contrary presumption is necessarily indulged. Two portions of the claims are segregated by patented placer ground, *which is presumed not to include veins*; in this respect the placer claim is

upon the same footing as would be a mill site or a piece of agricultural land.

4th conclusion as to Hobson's Choice location.

So we say, without fear of successful contradiction, that the election by the Kohnyo claimant, filed in the Land Office on June 14th, 1898, was an abandonment of the south 700 feet of the Kohnyo claim. Moreover that that abandonment took effect *eo instanti*. Not only is abandonment in this class of cases a question of intent, but it takes effect instantly upon the formation of the intent or performance of the act evidencing such intent. It is not necessary that the intent to abandon should be expressed in writing. Any declaration or any act of the owner showing his intention to discard or relinquish the claim is sufficient. It may occur at any time, *even after a full compliance with the law as to performance of annual labor and otherwise*. It may be proved under the general issue, and it may sometimes also be proved by the act or conduct of the party, even against his expressed assertions to the contrary. (See Lindley, sections 642, 643 and 644). Says Mr. Lindley in section 643, from which we have already quoted: "Abandonment operates *instante*." Says Mr. Justice Beck in *Derry vs. Ross*, 5 Colo., 300: "Abandonment is a matter of intention, and operates *instante*." (Also, Clark Min. Law Digest, 128).

There may be cases where courts would hesitate about recognizing an abandonment. But the

case at bar most assuredly does not belong in that class. The owner of the Kohnyo voluntarily, as we have seen, reduced its intention to writing, and filed that writing in the Land Office, where it was duly recorded, and made effective as the foundation of the subsequent proceedings, and was notice to all the world. The right to abandon undoubtedly existed, and the abandonment *took effect at once, notwithstanding the fact that the receiver's receipt had not been formally canceled.* The act of the Kohnyo claimant in reality amounted to a cancellation of the receipt *by the entryman itself*; the formal recording of such cancellation by the Land Department was nothing more nor less *than a ministerial act.*

To say that under the circumstances defendant in error Gurney, who accepted the declaration of intention so solemnly made and placed of record, and re-located the property as the Hobson's Choice, shall lose the result of his expenditure and labor *merely because the ministerial act of recording the cancellation* of the receiver's receipt had not taken place, would be to *sacrifice substance to shadow*; it would be to so construe the law as to perpetrate a gross fraud by the flimsiest sort of a technicality. We have no fear that any court will ever uphold such a view.

THIRD. ATTEMPTED LOCATION OF P. & G. INVALID.

In view of the foregoing discussion, it is hardly necessary for us to take up or consider the

legality of the P. & G. location. This location rests, as we have seen, entirely upon the proposition that the southerly 700 foot tract of the Kohnyo claim did not become a part of the public domain until the formal cancellation of the receiver's receipt with reference thereto, on the 15th of July, 1898. Further, that the *effect of such cancellation was to so restore said tract to the public domain*, and thus, for the first time, to render it liable to re-location. This position must of course fall if our discussion in relation to the Hobson's Choice be correct; for if the Hobson's Choice location was valid, it follows necessarily that the P. & G. location is invalid. We will, therefore, abbreviate this branch of the discussion; in fact, it has already been largely anticipated.

The territory in question had, as we have seen, reverted to the public domain, and had been re-located prior to the cancellation of the receiver's receipt on the 15th of July, 1898. But if this were not so, we most emphatically assert that it did not so revert upon such cancellation, and in that event, the P. & G. location would of course be void. That is to say, if *before* the cancellation of the receiver's receipt as to said tract, the tract remained segregated from the public domain as a part of the Kohnyo location, such segregation continued *after* the cancellation of said receipt; and on the 16th of July, when the P. & G. location was attempted to be made, this tract was not a part of the public domain, and that location was illegal.

The cancellation of a mineral patent entry—of the receiver's receipt—does not of itself alone ever operate to restore the land to the public domain, and render it subject to re-location; it does not divest the claimant's title; it simply either checks or terminates the patent proceeding. The annulment of this instrument is, like its issuance, a mere incident in the proceedings prescribed for procuring title from the government; although the receiver's receipt while it remains in force, is evidence of a compliance with the preliminary patent conditions, and that the holder is entitled to Government title in fee, yet its revocation does not evidence either a forfeiture or a relinquishment of the location or claim by an applicant; it has no necessary connection either with the segregation of the land from the public domain, or with its restoration thereto. If, at the revocation of a patent entry, the claim is subject to location, or to re-location, *it is because for some collateral reason the same would have been subject hereto had the entry not been made*; as where it turns out that a locator and applicant for patent is an alien and has not declared his intention to become a citizen, and the attempted location is therefore void *ab initio*; or where a forfeiture of the applicant's rights has taken place by reason of failure to do the annual assessment work. On the other hand, a large class of cases exists, where, upon the cancellation of a patent entry, the land remains segregated and does not revert to the public domain; as where the original

location was valid and no forfeiture has taken place, but the cancellation is upon the ground that the pre-requisite amount of \$500 worth of work was not performed.

"Such cancellation (of the receiver's receipt) would not of itself render the ground subject to re-location. The applicant would simply be relegated to such possessory rights as he had prior to the initiation of patent proceedings, and such as he may have subsequently acquired."

Lindley, Sec. 772.

"The fact that an entry was canceled, would not of itself render the ground subject to re-location. The original location of the lode was not effected by the cancellation, even though it had been regular, and the owner could still hold it under its possessory right so long as there was a compliance with the requirements of law."

McGowan et al, vs. Alps Con. M. Co., 23 L. D., 115.

"The cancellation of Magruder's entry therefore simply set aside all that had been done towards the acquisition of a patent, and left his rights of possession under his location, and compliance with law as to yearly improvements, whatever those rights were, intact, and Magruder free to sell his possessory right the same as if no entry had been made or attempted."

In re John R. Magruder, 1st L. D., 527.

"The fact that an entry was canceled will not of itself render the ground subject to re-location. The original location is not affected thereby."

Barringer & Adams on M. & M., 316.

Authorities to this proposition might be extensively multiplied, but the foregoing are amply sufficient. The order of July 15, 1898, was not necessary to restore the 700 foot tract to the public domain. That result had followed the abandonment on June 14th preceding; which abandonment is expressly referred to and relied upon in the order of cancellation of July 15th. The latter order simply and solely put in different form the record of a pre-existing fact; giving the strongest possible interpretation to it, it amounted solely to an acceptance or ratification of the Kohno claimant's affirmative and express abandonment made previously and on June 14, 1898. It did not in any manner change or affect the status of the south 700 foot tract of the Kohno under that abandonment, or postpone, or otherwise change the taking effect of said abandonment.

The formality of cancelling the receiver's receipt on July 15th, was wholly ineffectual to destroy or jeopardize or affect the validity of the Hobson's Choice location made on the 23rd of June preceding. And it was even more impotent to give any life or legality to the attempted location of the P. & G. claim on the day succeeding, to-wit, July 16, 1898.

We deem it unnecessary to further prolong the present discussion; additional arguments, illustrations, and authorities could undoubtedly be adduced in support of our conclusions. But, until we learn upon what propositions of law and upon what

reasoning counsel for plaintiff in error relies, we feel that enough has been said; we will, therefore, in so far as the opening argument is concerned, submit the case to the court.

PART II.

Counsel for appellee have filed a very able, ingenious, and in our judgment, misleading argument of 118 printed pages. As to whether they have covered the matters really involved in the case may be doubtful; but certain it is that they have injected a vast amount of material foreign to the issues presented and tried; they have shown remarkable industry in the collection and citation of authorities, but we seriously question whether their discrimination equals their industry. With most, if not all, of the authorities so cited, considered in the abstract, we have no fault to find; but, unless we misapprehend the questions really involved, we venture the belief that the principles announced in a large proportion of these cases have but little more application here than have the causes of the precession of the equinoxes.

For the purpose of more clearly understanding the brief of appellee, it will be an advantage to prefix a short general outline thereof. This brief is divided into three main or principle "Divisions." The first division consumes fifty-four pages, barring a few pages given to a statement of the facts, and is entitled "Scope of the Review." The argument in this division is devoted exclusively to a contention that the stipulation of facts upon which the cause was tried in the court below is defective in two important particulars, and to an effort to show that these inadvertent omissions in the stipulation are fatal to the cause of appellant.

Division two of appellee's argument covers the next forty-five pages, and is entitled, "Appellant's Brief." In this division counsel *inter alia*, pay their respects to us in the following complimentary terms:

"By persistent iteration, but without argument or reason to support it, appellant's counsel devote pages nine to seventeen of their printed brief to the development of the following theory."

And they attempt to controvert the view expressed in our opening argument upon two very important questions, viz:

As to the *suspension* of the operation of the commissioner's decision and order of May 28th, 1895, until the decision by the Secretary of the Interior, of May 7th, 1898—and as to the fact and date of *abandonment* of the southerly 700 foot tract of the Kohnyo mining location or claim.

The third grand division of counsels' brief is, of course limited to the remaining twenty-eight pages. It presents the merits of their side of the case. It is entitled "Premises in Controversy not segregated by Kohnyo Location," but incidentally discusses two minor questions. It first develops the view that the Kohnyo location never legally included the southerly end of that claim; and that until the Scorpion location was made, this tract always remained a part of the public domain. It follows that contention with the assertion that if the Kohnyo location did legally include the said southerly end thereof, the formal cancellation of

the entry as to such southerly tract, made on the 15th of July, 1898, related back to May 28th, 1895, and took effect and restored said tract to the public domain *as of said last mentioned date*. And, finally, this division of the brief closes with the contention that if the Scorpion location was originally premature because made while the ground was not a part of the public domain, the defect was cured and the location rendered valid by the filing of the amended location certificate thereof on the 15th day of July, 1898.

We will now proceed to consider the questions presented by appellee's brief more in detail. In so doing, we will follow the arrangement of subjects therein adopted.

I.

**COUNSELS' TECHNICAL OBJECTIONS NOT
WELL TAKEN.**

As already suggested, nearly two-fifths of counsels' brief is devoted to the subject of defects or omissions in the statement of facts. It will be remembered that, although this was an adverse suit, yet it was tried by agreement before the District Court without a jury, and upon a stipulation of facts. Counsel approach the discussion of the alleged omission by inadvertence of certain matters that should have been covered by this statement, in what we may respectfully term *an apologetic manner*. They take pains to repeatedly declare that this statement of facts, together with

the exhibits, were prepared by counsel for appellant without the assistance of counsel for appellee, or at least of the counsel who wrote appellee's brief; they say that they merely glanced over the statement sufficiently to see that it was broad enough to protect the interests of their clients.

We do not consent that the entire responsibility for this statement shall be placed upon us. It may have been originally drafted by some one on our side, but it was submitted to counsel for appellee in the utmost good faith, for the purpose of having it carefully considered, and all facts and circumstances of importance relating to the controversy included. The intended scope and substance of the controversy were well understood by them and we say that if any important matters were omitted, it was just as much the fault of counsel as it was our fault.

It is not strange under the circumstances that, in raising these questions, counsel are manifestly embarrassed. We are not surprised that they profess reluctance in trying to take advantage of the alleged omissions. Whether, in presenting these matters, counsel are in any manner guilty of violating the ethics of the legal profession, we leave without comment for this court to consider. That they themselves entertained misgivings, but finally concluded that duty outweighed any professional scruples on the subject, is shown by the following extract from page 33 of their brief:

"After a careful consideration of our

duty in the premises, it seems to us that we owe it to our client to direct the attention of this court to what we consider fatal omissions in appellant's proofs. When a stipulation is presented an attorney for signature, his duty to his client requires a sufficiently careful examination to make certain that it contains nothing which he may not properly concede; but we know of no rule, either legal or ethical, that requires under such circumstances the protection of the opposition. * * * We believe also that where questions of fact have been mutually overlooked, as in the case at bar, the consequences should fall upon him who had the affirmative of the issue, and especially is this true when that person is himself responsible for the omissions."

But further preliminary comment in this connection is wholly unnecessary. Our contention is, as we will clearly demonstrate, that all this portion of counsels' brief is a fighting of windmills. That, as to one of the alleged omissions, no harm is done to either party thereby; and that as to the other alleged omission, counsel are mistaken—the matter being in fact amply covered by the stipulation and exhibits.

**First. Appellee's Argument Upon Insufficiency of Identification of Ground,
Not Sound.**

Your Honors will remember that this is a three cornered controversy. Three different par-

ties, two of whom are appellants and the third appellee here, attempted to locate the same tract of mining territory; this tract had been previously covered by a location known as the Kohnyo claim; but, owing to the fact that the Kohnyo claim was divided by the corner of a patented placer claim into two parts, the Land Department declined to permit the Kohnyo claimant *to patent both ends of the claim*; the northerly end comprising about 500 feet, and the southerly end about 700 feet of territory. The southerly 700-foot tract thus included within the Kohnyo location became, by virtue of the ruling of the Land Department and subsequent action of the claimant thereunder, unoccupied public domain. The three different parties mentioned undertook to secure this tract by making locations thereof. The only question really submitted for trial was the point of time at which this tract reverted to the public domain. Upon the determination of this question rested the decision as to which of these locations was valid; it being conceded that in the three instances all location acts required by law were performed. Each of the locators contended that his location was the first one made after the ground became public and unoccupied property. Perhaps it is only just to appellee's counsel to add that in their brief here they advance the claim that, as a matter of law, the Land Department was mistaken, and the Kohnyo location never did include the tract in question.

The first omission counsel discovers in the statement of facts relates to the identity of the tract in question. That the tract covered by each of the three contesting locations is substantially the same counsel do not dispute. Nor do they dispute that, *as a matter of fact*, said tract is the identical southerly 700 feet of the old Kohnoyode location. But they now assert that the stipulation of facts adopted in this case fails *to anywhere state* such identity. That is to say, while the territory covered by the three contesting locations was undoubtedly the southerly end of the Kohnoyode location, yet by inadvertence appellant failed to see that this fact was incorporated into the agreed statement, and for this sin of omission alone he must pay the penalty of defeat.

We will not consume time or space with an attempt to show that counsel are mistaken in regard to this omission. What we most emphatically assert is that, assuming that counsel are correct in this regard, their conclusion as to the *effect* of the omission does not follow.

Authorities are cited to the proposition that this court will be governed in its determination of the case by the record as made in the court below—that it will not allow extraneous matters to be here incorporated into such record. Authorities are also cited tending to establish the further proposition that if the evidence wholly fails to disclose a fact so material as to be necessary to a party's success, he must fail, and this court has no

power to relieve him, although the omission was a mere inadvertence.

But these authorities do not reach or cover the specific objection; they are not at all determinative of the matter before us. The following actual facts presented by this record forbid their application.

These facts are: That the identity of the ground in controversy with the southerly 700 foot tract of the old Kohnyo location *was always assumed*; its existence *has never been, and is not now doubted*; and the sufficiency of the stipulation in this regard *was never raised* until counsel were engaged in the preparation of their present brief. The stipulation was not read by either side, in presenting the case to the trial court; but counsel for appellant, in reciting the substance of that stipulation *included this identity of territory* as one of the facts in the case, counsel for appellee *accepted this statement*, as did the trial court, and the argument proceeded and the cause was tried and determined upon the *full assumption* that this identity was a fact before the court. All these things, and more, are shown by counsel in their brief, from pages 31, 32, and 33, of which we quote:

"Upon the trial in the court below, the stipulation of the facts was *not read by either party* to this controversy, or the case of Small v. Brown, which was also submitted thereon for decision. The substance of the agreed facts, as the same was then understood, *was recited to the court on oral argument and the case was tried upon the as-*

*sumption that the conflict area described in the complaint herein is identical with that portion of the Mineral Entry No. 573 (the Kohnyo), lying southerly of line 25-26, Survey No. 7407, of the Mt. Rosa patented placer claim; and it was further assumed upon the trial that the agreed statement of facts thus identified the premises in controversy herein. With perfect good faith, and with full assurance that the stipulated facts so identified the tract in controversy, this assumption was indulged by the court and all the parties to the controversy, both in the case at bar and in the case of Small v. Brown. We might add that we believe it to be a fact that the conflict between the Hobson's Choice and the Scorpion claim is substantially, though not exactly, identical with that portion of the Kohnyo claim described as lying southerly of line 25-26, Survey No. 7407, or the Mt. Rosa placer claim. * * **

*From an examination of the record, it would appear to be a certainty that the case was tried in the lower court upon assumptions which are wholly unsupported by the written evidence contained in the agreed statement of facts. * * **

The truth of the matter is that, after the preparation, execution, and filing of the agreed facts, the stipulation, containing such facts was never again read or digested by any of the parties in interest. The trial court and counsel for all the parties litigant simply assumed that the stipulation covered facts which, upon investigation, we fail to find. One of these omissions, to-wit, the identification of the tract in controversy herein with that portion of the Kohnyo lode upon which the receiver's receipt was canceled, the writer who

signed the stipulation in question *fully believed was covered.* * * * that the tract in controversy here is identical, or substantially identical, with that portion of the Kohnyo claim upon which the receiver's receipt was canceled (*a fact which we concede, but a fact which the record does not show.*)”

Then counsel, on page 32, referring to the other alleged omission from the record, say:

“We contend that unless the appellant, who has the affirmative of the issue, has shown by the record that the Kohnyo claim was at the date of the discovery of the Scorpion, a valid lode mining location, then the Kohnyo claim would not operate to segregate from the public domain the ground in controversy, and under the other facts stipulated the Scorpion must prevail.”

And, again, counsel on page 33, make the further admission that,

“It is true that neither of these questions was raised in the court below.”

Thus our statement given, of the real facts, is fully borne out by the frank declarations and admissions of counsel in this court. *They candidly admit the assumption of the identity of the ground in controversy with the southerly end of the old Kohnyo location, by all parties in the court below, and the trial and decision of the case by the court upon this assumption.* They also, with equal candor, admit and declare to Your Honors that this assumption *is absolutely correct as a matter of fact.* Under

these circumstances we say that such identity will be taken for granted by Your Honors in the review here; that this court will try the case as if the particular matter had been formally incorporated into the record. Any other procedure would be most unjust, and would place a premium upon the perpetration of fraud. In this particular case we cheerfully accept the disclaimer of deceit or intentional suppression of facts by appellee or his counsel; but if such a rule as is here contended for were laid down by Your Honors, an invitation would be extended to the winning of causes by means of such fraud and deceit. To hold that where counsel have in the trial court conceded the existence of an important fact, and the court has tried and decided the case upon the assumption of the fact, yet they may, nevertheless, on appeal, stultify themselves and rely upon the absence of such fact from the proofs formally introduced, would make a mockery of justice. Such a holding is too shocking for serious contemplation.

Fortunately no such principle has yet found a lodgement in the law, and we firmly believe that it never will. *The true rule as established, we believe, without contradiction, is that where a certain fact is accepted in the trial court and the trial proceeds without objection upon the assumption that such fact exists, and the court decides the cause relying upon such assumption, neither party will be heard in the court of review to question the existence of the fact.* Such existence will there be presumed also,

and the cause will be reviewed from the same standpoint in this regard as it was tried in the court below. This is a very different thing from the omission of an important fact from the record; it clearly appears in the record and in the admissions by counsel.

"Where a fact is assumed to be true in the trial court, it cannot afterward be contested in the appellate court."

2 Enc. Law & Proced., 675.

In a case where a deputy U. S. Marshal was defending the possession of property taken by him under execution, it was objected upon appeal that there was no evidence to support the finding that he was a duly appointed, qualified, and acting deputy United States Marshal. To which the court say:

"Plaintiffs, by their questions during the trial, *treated the defendant as such deputy marshal*, and the evidence contains the return of summons, and also certificate of sale of the property in the execution in which he signed as deputy marshal. The question *was not raised by counsel* in the trial of the case," and refused to sustain the objection.

Blish v. McCornick, 15 Utah, 188, 194.

In an action to recover upon a promissory note, it was objected upon appeal that there was no proof that plaintiff *was the owner* of the note. Counsel for defendant, in making a statement of his case to the jury *referred to the plaintiff as the owner of the note*; and he made other statements in

which such ownership was recognized. These were not statements of what counsel expected to prove, but they were made by him *as assured facts*. The court treated these as admissions, among other things, saying:

"Where a cause is so conducted that the court and counsel may rightly, and do infer, that *certain facts are conceded or admitted*, the court may so treat them for the purpose of the instructions," and overruled the objections.

Pratt v. Conway, 148 Mo. 291, 298.

In an action for trespass, objection being made upon appeal, to the failure of plaintiff to make *formal proof of title*, it appeared that defendant's witnesses had incidentally spoken as if plaintiff owned the property. Referring to this assumption the court says:

"It may well be regarded *as an admission* of plaintiff's title, in view of the fact that it was not attacked at the trial or general term."

And the court significantly adds, referring to another well known principle:

"Any alleged defects in the chain of plaintiff's title *should have been pointed out specifically* on the motion to non-suit, so that plaintiff might have offered further evidence in regard to it, if so advised," and overruled the objection.

Humes v. Proctor, 151 N. Y. 520, 525.

Where the defense is that suit was brought before expiration of credit, *plaintiff's recital of the*

time of the commencement of the suit in his statement to the jury *is a concession of that fact* and cures formal proof of the same, where the objection *is first raised upon appeal.*

Consumers' Brewing Co. v. Lipcot, 47 N. Y. Supp. 718.

In a case where the width of a certain right of way was material, a map having been offered, received in evidence and admitted to be correct, on which the width of the right of way was marked; it was held, upon an objection, upon appeal, that the width of the right of way was not proved, that defendant *was in no position to complain of formal proof*, and the objection was overruled.

Allen v. St Louis, etc.

Ry. Co. 137 Mo., 205, 217.

An objection that it was not proved that a foreign insurance company *had authority to do business within the state* cannot be made for the first time in the appellate court so as to control the decision.

Warner v. Delbridge, etc., Company, 110 Mich. 590.

In a case where the *existence of a contract was assumed* and an issue was made upon the question whether L. was bound to pay M. certain moneys under the contract, such issue being supported by evidence and an instruction to the jury, the attempt to challenge the existence of such contract binding upon L. was denied; The court says:

"By his (L's) *consent the issue was sub-*

mitted to the jury, and failing to object or to except to the instruction or to the testimony about it, he cannot afterwards be heard to complain. Aside from this consideration, there is another proposition springing from the pleading wherein the defendant (L.) by his answer construed the contract according to the plaintiff's contentions. It being a matter of debate what the proper construction of it was, it may well be said that when a defendant tenders an issue upon the subject, *alleges a construction* in accordance with his view, he cannot afterwards be heard to contend there *was no issue concerning it*, and no evidence ought be introduced about it.

Lemmon v. Sibert, 15 Colo. App. 136.

A cause was tried in the court below upon the assumption that the answer sufficiently put in issue the allegations of the complaint. Evidence was offered on both sides touching the issue, precisely the same as if the answer were entirely sufficient. Upon the review, defendant attempted, for the first time, to take his objection to the insufficiency of the answer. The court say:

"Now, since the case has come here for the first time in its whole history, and after all opportunity for amendment is gone, objection is taken to the form of the denial; the objection cannot be considered; the point should have been made below, and not having been made, it is waived."

Gallup v. Workman, 11 Colo. Appls. 312.

In the trial of a cause below, a certain lease *was assumed to be legal*. And the trial proceeded

to a conclusion upon that assumption as a fact. On appeal the objection was made that the lease violated an act of congress and was void. This court said:

"It is argued by counsel for appellants that the judgment should be reversed, for the reason that the consideration of the note sued upon was illegal because the lease in question was a violation of the Act of Congress of February 25th, 1885, entitled 'An Act to Prevent Unlawful Occupancy of Public Lands,' 23 U. S. St., 321. This question seems to be presented for the first time in this court. The lease claimed to be illegal was introduced by appellants themselves, its illegality was not urged in the court below, and is not assignable for error in this court. It follows that the question is not before the court and cannot be considered."

Jennings v. First Nat'l Bank, 13 Colo. 423.

"The cardinal principle of appellate procedure, which requires that questions of which a review is sought shall first be appropriately brought before the trial court for decision, makes it indispensably necessary that positions should not be shifted on appeal. For if parties were allowed to change positions, the appellate tribunal would often be compelled to decide questions as purely original ones, and this certainly is not the purpose for which they were created."

Elliott on Appellate Proced., Section 489.

"Still another phase of the principle appears in the case which adjudges that a party who *has treated a contract as valid* in

the trial court cannot impeach it on appeal, for illegality."

Elliott, Sec. 491.

"Upon the same principle, it is held that a party who affirms the validity of a contract in the trial court must proceed upon that theory throughout the litigation in the appellate tribunal."

Elliott, Sec. 492.

"It is held that if the parties put a definite construction upon the pleadings in the trial court and induce the court to act upon that construction, they must adhere to it on appeal."

Elliott, Sec. 494.

"Thus, if a court has jurisdiction in actions of replevin only when the property is situated in the county, the failure to make the point that the property in dispute *is not within the county* will preclude the party from making it on appeal."

Elliott, Sec. 500.

Commenting upon the reason for the rule thus stated and illustrated by Mr. Elliott, that learned author, in Section 496, says:

"The rule is one required by logic and by practical considerations, since without it inconsistent positions might be assumed without any other restriction than that of the party's pleasure. But it is something more than a mere logical rule for securing consistency, in as much as its principal purpose *is to prevent deception*, since without it *parties might mislead their adversaries by assuming one position in the trial court and another on appeal*. Nor could there be an

orderly administration of justice without such a rule."

We are aware that some of the illustrations given are cases where an issue in the pleadings or the legality of a contract was assumed, or where the record was entirely silent concerning a material fact. But these illustrations strongly reinforce and emphasize the other citations above made. How much stronger is the proposition that, where the existence of a material fact *is affirmatively and expressly assumed by both parties and the court in the trial of the cause, the existence of such fact should not be denied upon appeal*. We are certain that such a denial will not be allowed by this court.

Second. Appellee's Contention That Stipulation Fails to Show Validity of Original Kohnyo Location Considered.

But counsel imagine that they have discovered another mare's nest in connection with the stipulation in this case; they say that this stipulation does not show *that the original Kohnyo location was valid*; they insist that the validity of that location was an essential fact precedent to a decision of the real merits of this controversy; that unless the Kohnyo location was valid, the territory purported to be covered thereby was never segregated from the public domain. And that, therefore, it would follow that the Scorpion location, which was at-

tempted to be made admittedly prior to the date of appellant's location, the Hobson's Choice, must necessarily prevail. Therefore, they say that the inadvertence of counsel in omitting from the stipulation a statement that the Kohnyo location was valid must be held fatal to the cause of their client.

This is the second alleged defect in the stipulation, inadvertently and mutually made, upon which counsel rely strenuously to secure an affirmance of the judgment by this court. As to this alleged defect, the conditions in the trial court were practically the same as the alleged want of identification of the ground which we have already considered. In the presentation of the case to the trial court, *counsel for both sides assumed that the Kohnyo was a valid location*; the case was argued and presented throughout *upon that assumption*; no suggestion or intimation came from appellee or his counsel in any manner questioning the existence of this fact.

Referring to this subject, at page 33 of their brief, counsel say:

"It is true that *neither of these questions* was raised in the court below"—the other question being the identity of the ground in controversy, already considered.

The court below tried and decided the case upon the assumption of this fact. The cause in that court was conducted throughout upon the hypothesis that the sole defect in the Kohnyo location was the one occasioned by its conflict with the Mt. Rosa Placer; that, by reason of such conflict,

the Land Department reached the conclusion that both of the disconnected ends of the Kohnyo could not be covered by the Kohnyo patent; and, finally, that, as already stated, the ruling of the Land Department, together with the action of the Kohnyo applicant under that ruling, operated to restore the south 700 foot tract of the Kohnyo location to the public domain. The question reserved for trial in this case in connection with each of the new locations contending for the ground, viz:

“Provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain,”

was treated as resting upon the further question as to what date the southerly tract of the Kohnyo was restored to and became unappropriated public land.

Had counsel, at the trial, in any manner relied upon these alleged defects in the stipulation, or had they even called attention to or suggested the same, there is no doubt but that, if the omissions existed, they would have been supplied. A stipulation is no more binding or sacred than evidence offered in the ordinary way at the trial of a cause. If the court's attention is called, by motion for nonsuit, or otherwise, to an inadvertent omission in evidence, he may ordinarily, in his discretion, allow the same to be cured by receiving additional proofs. And certainly the rule would be no more pronounced in a case like the present, where the

party objecting is himself partially responsible for the inadvertent omission. For there is a difference between the case of evidence offered pro and con, in the ordinary course of a trial, and the case of a stipulation where *both sides unite in an attempt to state all the salient and important facts in the case.*

We say that our argument and authorities above upon the question of the identity of the tract of ground in controversy with the southerly end of the Kohnyo claim, are also applicable to the discussion and determination of the present contention, and that appellee will not now be permitted to challenge the validity of the Kohnyo location.

But all of the foregoing touching this second alleged omission from the stipulation of facts, is unnecessary. *The point is not well taken on the evidence.* Counsel are wrong in assuming that the stipulation and exhibits fail to show the validity of the Kohnyo location.

We treat with charity the abandonment by counsel of the theory upon which the cause was tried in the lower court, and their reliance upon the inadvertent omission of facts which they treated as existing. It may be that zeal for the cause of their client, or difficulty in finding something substantial to support that cause, would excuse their action in bringing such a question to the front. But these considerations can hardly justify the

attempt to ignore, belittle, or pervert the stipulation in order to sustain such a contention.

They admit that a receiver's receipt sufficiently evidences the performance of the necessary acts of location. A proposition that every mining lawyer knows is too well settled to permit of dispute. They say, at page 48 of their brief:

"So, while we concede that a properly authenticated certificate of purchase or final receiver's receipt affords in this case proof of the performance of all statutory acts requisite in the discovery, location and development of a mining claim," etc.

And at page 84 they say:

"On March 6th, 1895, the Khonyo claimant *entered both of the Khonyo tracts* at the Pueblo Land Office, purchasing and paying the United States for the area therein contained. On that date *a final United States Receiver's Receipt was issued* to the Cripple Creek Gold Mining Company as a muniment of title. So far as appeared upon the face of the record made of this transaction, the United States had, by its proper officers thereunto duly authorized, sold and received payment for both of these tracts, and while the judgment of the Commissioner entered on May 28th, 1895, decided that the transaction was in derogation of the public land laws, so far as the southerly tract was concerned, the record shows that the receiver's receipt issued to the purchaser was still extant and the purchase money still retained by the vendor."

But they accompany the concession made in

the first of these extracts with an assertion that the Receiver's Receipt or certificate of purchase *was held for cancellation* by the action of the Land Department. And they attack the receipt or certificate of purchase admitted in the second of these extracts to have issued upon the Kohnyo, in so far as the southerly end of the claim is concerned, on the ground that its entry was *in derogation of the public land laws* and void.

These two contentions will receive proper consideration hereafter under the proper headings in this brief. At the present time we simply wish to call the attention of Your Honors briefly to the status of the Kohnyo location in response to counsel's assertion that the stipulation is silent as to its validity.

Upon this particular subject we first call Your Honors' attention to the foregoing extract from page 24 of counsel's brief. They there say that the *record here shows* issue of the final receipt to the Kohnyo, payment for both ends of that claim, and that on May 28th, 1895, said money was retained and the receiver's receipt was still extant as evidenced by the stipulation of facts.

Paragraph numbered one of the stipulation in this case recites, "that on the 28th day of May, 1895, the Commissioner of the General Land Office rendered a decision, of which a certified copy is here-to attached and marked "Exhibit A." Said 'Exhibit A' refers specifically to Mineral *Entry No. 573*, made March 6th, 1895, by the Cripple

Creek Gold Mining Company, upon *the Kohnyo and Fortuna Lodes*;" it recognizes that entry as an existing fact; it does not cancel the same or in any manner question its legality in so far as the discovery of mineral upon the public domain and the performance of all the necessary acts of location are concerned; on the contrary it clearly affirms the performance of such acts and the validity of the Kohnyo location; it simply declares that, in accordance with a previous decision, the applicant cannot be permitted to *include in the patent two noncontiguous tracts*; and it then gives said applicant the privilege of choosing *upon which of the two tracts* it would proceed to patent.

By what process of reasoning counsel can say that this holding operates to do away with the presumption of a valid location, created by the making of the entry, we cannot understand. To our mind Exhibit "A" is equivalent to the following statement by the commissioner, to the Kohnyo applicant:

"You have discovered mineral upon the public domain and have performed all of the acts necessary to constitute a valid location of the Kohnyo claim; you have complied with the law in your patent proceedings leading up to the final entry; you are entitled to a patent, but owing to the principle announced in the Silver Queen decision, you cannot have both of the non-contiguous tracts within the surface boundaries of your location and claimed by you; you may, however, select either one

of these disconnected tracts and proceed to patent therefor."

If Exhibit "A" is not a clear recognition and reaffirmance of a valid location of the Kohnyo claim, then we confess that we do not understand the English language.

Exhibit "B" recognizes the position taken in Exhibit "A" throughout; in addition it shows that the Kohnyo applicant asked permission to prove that the placer applicant *knew at the date of his application for patent, of the existence of the Kohnyo vein through the corner of the placer claim* and between the segregated ends of the Kohnyo location. The department recognizing the principle that if the placer applicant *did* know of the existence of that vein at the date of his application, the vein did not pass with the placer patent—the title thereto remaining in the United States—and it could be properly covered and included within the Kohnyo location, thus connecting the two ends thereof, granted the privilege asked by the Kohnyo applicant.

Surely there is nothing in Exhibit "B" that tends to weaken in any manner the force or effect of Exhibit "A"; on the contrary Exhibit "B" extends to the Kohnyo applicant a privilege which, if his contention were sustained, *would have enabled him to include within his patent both ends of the Kohnyo location.*

Exhibit "F" is dated October 22, 1897, nearly two years and five months later than the date of

Exhibit "A"; it recites the proceedings shown in Exhibits "A" and "B" and then, after reviewing at length the evidence offered by the Kohnyo applicant to establish knowledge of the Kohnyo vein by the placer applicant in the placer ground, at the time of the placer application for patent concludes that the Kohnyo applicant has failed to maintain its contention. The learned commissioner says:

"Upon a careful consideration of the entire record of this case, including, the able briefs and arguments of counsel, I have reached the conclusion from the evidence, and accordingly so decide, that the contestant has failed to show by a clear preponderance of the evidence that at the time the application for patent of the Mt. Rosa Placer claim was filed, it was known that the ground in controversy herein contained a valuable vein or lode bearing mineral. * * * And contestant's petition to be allowed under departmental decision in case of the South Star Lode Claim (20 L. D. 204) to enter and receive a patent for the ground in controversy is hereby denied."

An appeal being taken from the decision of the commissioner referred to in Exhibit "F", on May 7, 1898, the Secretary of the Interior pronounced a final decision of affirmance. This decision refers to the attempt of the Kohnyo claimant to prove knowledge of the existence of the vein by placer applicant, then proceeds to analyze the evidence and discuss the law involved upon the authorities; it concludes by holding that the com-

missioner rightly placed the burden of proof to establish such knowledge upon the Kohnyo applicant; and that such applicant had not sustained the burden.

Exhibit "H" is especially significant in this discussion. It was labeled "Election by C. C. G. M. Co. (the Kohnyo applicant) to take north tract;" it refers to the *Kohnyo final entry No. 573*, made on March 6, 1895, and also to the commissioner's order or decision (Exhibit "A") of date May 28, 1895, and finally to the decision of the Secretary of the Interior of date May 7, 1898; it is signed and sworn to by the President of the Kohnyo applicant (company), and after making the references above mentioned and stating that he is fully advised as to those matters, the President says:

"With authority so to do, affiant here waives the right of review of the last mentioned decision and *elects to retain in said M. E. No. 573* the portion of the Kohnyo Lode claim which is described in the above-mentioned letter of the commissioner as 'the five hundred feet on the north.'"

Thus Exhibit "H" constitutes another recognition of the continued existence of the Kohnyo location; it also recognizes the *validity of the entry of the Kohnyo claim* for patent; it is an *acceptance of the right of election* given by the decision of the commissioner, covered by Exhibit "A."

Exhibit "H" is the last portion of the evidence relating to matters that occurred *prior to* the attempted location of the Hobson's Choice mining

claim, and it was dated subsequent to the attempted location of the Scorpion; these being the claims now contesting before this court. Counsel say that we should have included in the stipulation of facts a statement that the patent did afterwards actually issue to the Kohnyo claimant for the portion of the ground so selected. We do not see the force or the necessity of this requirement. The acts subsequent to the making of the last of the contesting locations could hardly affect the status of the ground in dispute at the date of those locations; besides, as we have seen, counsel have admitted that an entry is sufficient, and that a patent is unnecessary.

The situation at the date of the making of the last of the contesting locations thus disclosed by these exhibits, is, in brief, as follows:

According to the record before this court, the Kohnyo claim had passed to final entry; this final entry had been recognized by the commissioner of General Land Office and the Secretary of the Interior; the question litigated in the land department for a period of about three years, as to the knowledge of the placer applicant at the date of his application for patent of the existence of the Kohnyo vein in the placer ground, had been decided adversely to the Kohnyo claimant; the Kohnyo claimant had thereupon accepted this decision, acquiescing therein, and had availed himself of the privilege extended by the commissioner's order (Exhibit "A") and elected to retain

the northerly tract of the Kohnyo claim, thus relinquishing the southerly tract thereof; it should be added that the entry as to the southerly tract had been formally canceled—Exhibit K.

There is not a single word in the stipulation or exhibits that weakens or in any manner contradicts these facts. And it seems to us like an attempt at juggling for counsel to contend that they do not show at least, *prima facie*, the validity of the Kohnyo location. In view of the situation as thus admitted, we say that counsel are absolutely mistaken in their present contention.

That counsel are hard pressed in their effort to maintain this contention is shown by their resort to and struggle with Exhibits "I" and "J". Exhibit "I" is dated April 27th, 1899, 11 months subsequent to the Scorpion location and ten months subsequent to the Hobson's Choice location. By the commissioner's order May 28, 1895, (Exhibit "A"), the Kohnyo claimant was required, in the event the northern end of the claim was selected, to make an amended survey so as to establish the southerly end line of the claim at the point where the lode intersected the placer; this amended survey was made, but in running the lines a slight variation from the original survey took place; thereupon the owner of another claim not in any way involved in the present controversy, the Hypatia, protested against the Kohnyo as described in the amended survey.

He claimed that the amended survey extended

the line too far southerly and encroached upon the Hypatia. Exhibit "I", being a decision by the commissioner, after reciting these things, orders a hearing between the Hypatia and the Kohnyo in relation to the interference, by the changed survey, of the location of the Kohnyo with the Hypatia; it also denies a request made by the Kohnyo claimant that the Fortuna, another claim included within the Kohnyo entry, be allowed to separately proceed to patent; giving the Kohnyo claimant, however, the privilege of going to patent upon the Fortuna by cancelling the entry wholly as to the Kohnyo claim.

Exhibit "J", which is a decision of the Commissioner of the interior of date three months later than Exhibit "I", refers to an intermediate holding by which the commissioner's ruling in Exhibit "I" was in one respect overruled; the Kohnyo claimant being permitted to proceed to patent for the Fortuna lode *without cancelling the Kohnyo entry*; it then recites the withdrawal of the amended survey made by the Kohnyo and objected to by the Hypatia, the dismissal of the Hypatia protest, *and the allowance of sixty days within which to make another amended survey of the southerly end line of the Kohnyo, under the decision of May 28th, 1895.*

How Exhibits "I" and "J" can affect the discussion of the present question we do not perceive; they both recognize as valid and binding the positions taken by the commissioner in Exhibit "A";

there is nothing in either of them to show, or tending to show, that the original location of the Kohnyo claim was not valid, or superseding or setting aside the entry of that claim on May 28th, 1895. On the contrary the very latest declaration by the Secretary of the Interior, in Exhibit "J", made over a year subsequent to the location of the three contesting claimants, before this court, of the ground in the controversy, affirmatively recognizes the validity of the Kohnyo location and entry by giving the Kohnyo applicant time to make an amended survey establishing its southerly end line adjacent to the placer ground; and it announces, in effect that if such amended survey is made within the time limited, the Kohnyo can go to patent.

We feel that an apology is due the court for spending so much time upon this specific question. Counsel has forced us to dwell upon this matter at length by their contention that there is nothing before the court tending to show the validity of the original Kohnyo location. We submit that the evidence is amply sufficient upon this question, and that counsels' contention has no foundation whatever in fact.

Counsel fail to discriminate between the case at bar and the case where an entry is suspended or held for cancellation upon the ground of fraud or failure to show compliance with law in some particular. *The Kohnyo entry was not held for cancellation in any such sense or at all; the legality and*

validity of the entry was always recognized from first to last; there was never any declaration of the land department questioning the location or compliance with law in making the entry; the territorial scope of the entry alone was challenged. The land department said:

"You have taken in two segregated pieces of ground; this does not invalidate your location or your entry, the entry may stand; but neither it nor the patent can cover more than one of the tracts. You may choose which of these tracts you will retain and proceed to patent for."

And even the final declaration, in exhibit "J," upon which counsel lay so much stress in their brief, is equally clear upon this question. The Kohno claimant is to be notified that it must make an application for an amended survey under the decision of May 28, 1895, or it must appeal. And in case of default, that the entry would be canceled as to the Kohno lode claim. This does not point out a defect in the Kohno location, or even in the Kohno entry. At least a year prior to that time the Kohno applicant had made its election to take the northerly tract of the Kohno location; it had not, however, caused a sufficient survey to be made establishing the southern boundary thereof for patent purposes. This declaration is equivalent to saying to the Kohno applicant:

"Your location is valid, your entry proceedings are regular and complete, but, owing to the exclusion of the southerly end, it becomes necessary for you to estab-

lish the new southerly end line at the place where the tract retained is contiguous to the placer."

Third. Effect of the Act of Congress of 1881.

In our opening brief we adverted briefly to the probable bearing upon this case of the Act of Congress of March 3, 1881. As Your Honors will remember, this statute provides that if, in an adverse suit,

"title to the ground in controversy shall not be established by either party, the jury shall so find and judgment shall be entered according to the verdict."

This act has been frequently construed and is always held to mean that it is not sufficient to entitle the applicant for patent to a judgment in his favor, that the plaintiff fails to prove title to the ground in the contesting location. It is held that before defendant, who is a patent applicant (in this case the Scorpion owner), can have judgment, *he must prove that his claim has title to the ground.* And it also held that, in making such proofs, all the requirements of law, relating to the location of a mineral claim must be shown to have been complied with. And, finally, the authorities declare that, if neither the plaintiff nor the defendant has made such proofs, then the jury must return a ver-

dict accordingly and judgment be entered that *neither party is entitled to the ground.*

McGinnis v. Egbert, 8 Colo. 55;

Becker v. Pugh, 9 Colo. 589;

Manning v. Strahlor, 11 Colo. 453;

Lindley on Mines, §763;

Perego v. Dodge, 163 U. S. 168;

Brannigan v. Dulaney, 2 L. D. 751.

But a valid location can only be made by compliance with all the provisions of the location statutes, and then only upon the public domain. It would seem necessary, therefore, that in order to recover in an adverse suit, the successful party, whether plaintiff or defendant, should not only show that he complied with all the provisions of the location statutes, but likewise *that at the date of his location the territory was public domain.* For the performance of location acts, such as the sinking of the discovery shaft, upon ground that is not a part of the public domain, avails him absolutely nothing, and is fatal to his right to recover.

Armstrong v. Lower, 6 Colo. 393, and other cases.

It would seem to follow that before appellee was entitled to recover in this action, he was bound to show that the ground in controversy was, at the date of his location, a part of the public domain. It was not sufficient for appellant (the plaintiff) to fail to show (if such failure had occurred) that this ground was not a part of the public domain at the date of the Scorpion location.

And the foregoing proposition is very strongly emphasized by the fact that under the stipulation *this was the specific question reserved for trial.*

Hence we say that, in view of the said Act of Congress of 1881, and in view of the further fact that the question whether the ground in controversy was a part of the public domain at the date of the respective contesting locations was expressly and affirmatively made the very essence of the trial, it looks as if counsel's contention, if accepted by this court, *would itself necessitate a reversal of the judgment.*

We do not rely upon this proposition; we merely mention it in passing. We have demonstrated that this contention is not true; we have shown that the exhibits *do* establish without contradiction the existence and validity of the original Kohnyo location. But, if we had not done this, and if counsels' contention were true, that this issue remained wholly unproved, the judgment of the court below may be in direct conflict with the Act of Congress.

II.

**APPELLEE'S VIEW AS TO SUSPENSION OF
ORDER IN EXHIBIT "A" AND AS TO
ABANDONMENT OF SOUTHERLY
KOHNYO TRACT CONSIDERED.**

We come now to the second grand division of appellee's brief. As already indicated, this portion

of that argument is devoted to two propositions, viz:

Answering our brief counsel deny that the proceedings shown by the exhibits as taking place before the land department, between May 28, 1895, when the first order was made denying the right to patent both tracts of the Kohnyo location and May 7, 1898, when the decision of the Secretary of the Interior affirming that order of the commissioner was pronounced, *suspended the operation of the commissioner's order during the intervening period*; and they discuss at length the law of abandonment of mining locations, and undertake to demonstrate that the filing by the Kohnyo claimant, in the land office, of its written election to retain the northerly tract of the Kohnyo claim *was not a relinquishment or abandonment of the southerly tract thereof*—the ground in controversy.

**First. Operation of Commissioner's Order
Was Suspended by Intervening
Proceeding.**

Counsel insist that, notwithstanding the intervening proceedings during the period above mentioned, covering about three years, the order of the commissioner, of May 28, 1895, remained operative; that since, by this order, the Kohnyo applicant was required to make its election, within sixty days from said date, as to which end of the claim it would retain and patent, in default of which election the entry of the southerly portion would

be canceled, and since the Kohnyo claimant did not make such election until June 10, 1898, the entry was canceled as to the southerly portion of the Kohnyo claim, (which is the ground in controversy,) at the expiration of sixty days, and on or about July 28, 1895; and that by virtue of such cancellation this tract then reverted to the public domain; also that, since the Scorpion location of this ground was attempted to be made prior to the Hobson's Choice location thereof, it must prevail.

This argument is ingenious but unsound. Counsel are obliged to show that the commissioner's order, of 1895, remained operative notwithstanding the proceedings already detailed, in the land office; about ten pages of their brief are devoted to the citation of authorities touching the questions of supersedeas and implied supersedeas in the courts, supersedeas under departmental practice, etc; and they reach the conclusion that since no direct appeal in the ordinary way was taken from the commissioner's decision, and no order was expressly entered by a court, or by the land department, granting the supersedeas, the commissioner's decision must have remained operative.

It seems to us that, in their zeal, and in their extremity, counsel are sacrificing the substance to the shadow. Certain it is that the land department itself *considered* the operation of the order of May 28th, '95, as suspended during this period; each and every of the intervening steps demon-

strates this fact; it was treated by the department as so suspended; no attempt was made to compel the Kohno applicant to proceed to patent the northerly tract; no attempt was made during this period to compel an amended survey to fix the southern boundary of that tract, or to cancel the entry upon failure to make such survey; nor was any order of any kind made that shows or in the slightest degree tends to show that the department regarded this order or decision as operative; on the contrary, fully demonstrating the view of the department that the operation of this order or decision was suspended, are the following facts:

That on June 10, 1898, and about five weeks after the decision of the Secretary of May 7, 1898, a formal election, in writing, by the Kohno claimant, to retain and patent the northerly tract, was received, recognized, and filed; that on July 15, 1898, the Kohno claimant was given sixty days within which to take steps to have the amended survey made, according to the decision of May 28, '95, showing the southerly line of the tract retained for patent; and that on July 31, 1899, owing to the Hypatia interference and the cancellation of the first amended survey, the Kohno claimant was again given sixty days within which to apply for said amended survey.

Another conclusive fact is that the above mentioned order of July 15, 1898, affirmatively canceled the Kohno entry as to the southerly tract—the tract here in controversy. This order of can-

cancellation is based upon the following declaration:

"In view of the fact that *no motion for a review of the departmental decision of May 7, 1898*, affirming the decision of this office May 28, 1895, was filed within the time prescribed by the rules of practice, *the decision last mentioned became final*, and it now devolves upon this office to execute the same."

This language absolutely forbids any possible controversy as to the understanding, meaning, and intent of the Land Department in the premises. The decision of May 7, 1898, was the final decision of the Secretary of the Interior; the cancellation was not based upon a failure to appeal from the order of May 28, 1895, but upon a failure to appeal *from the decision of May 7, 1898*, the declaration is expressly made that, by such failure to appeal from the latter decision, "the decision last mentioned (May 28, 1895,) *became final*;" what does the land department mean when it says that the decision of May 28, 1895, became final on May 7, 1898; obviously that the earlier decision did not become final until the latter date; and it follows, of course, that its operation was suspended in the meantime, and until it became final.

Thus it appears beyond possibility of question that the Land Department itself considered the operation of the decision of May 28, 1895, as suspended until the decision of the Secretary of May 7, 1898, affirming the same. And we submit that counsel will not be heard to challenge the

correctness of the department's view and proceeding in that matter; such a challenge would be a collateral attack, which, as we will presently more fully show, is not allowable.

But now let us consider this subject for a moment from the standpoint of reason and logic. The decision of May 28, '95, (Exhibit "A"), denied the Kohnyo applicant the privilege of patenting *both* ends of its claim; such denial was based solely upon the ground that the two portions of the claim were segregated by the corner of a patented placer location; but, under the law, as we have already seen, if the Kohnyo vein extended through this placer ground and was known by the placer applicant to exist at the time of his application for patent, that vein did not pass by the patent—title thereto remained in the government, and it was subject to location; with that fact established, the objection of the land department would be obviated, and the Kohnyo claimant *would be entitled to patent both ends of the claim*; together with the vein and a strip of land through the placer location.

Under these circumstances the Kohnyo claimant applied to the department for permission to institute a proceeding for the purpose of demonstrating the above fact, viz: That the placer applicant knew of the existence of the Kohnyo vein in the placer ground at the time of his application for patent; the department granted this permission, and the subsequent proceedings during said period

of three years were mainly devoted to the trial and determination of that question.

If the Kohnyo applicant had succeeded in establishing its claim, the result would have been to entitle it to maintain its entry throughout, and, as we have seen, patent both tracts covered by the original Kohnyo location. Obviously, therefore, until that question was determined, it would not have been proper for the department to proceed, or to force the Kohnyo claimant to proceed, to patent one of the segregated portions of that claim. Counsel say that this controversy was between the placer patentee and the Kohnyo alone. It may be true that the proceedings in the land department were conducted by and in the names of these two parties; but the United States was as much interested as if it had been a party. For upon the decision of this controversy depended the *extent of ground outside the placer claim, to be covered by the Kohnyo patent.*

It is, therefore, perfectly clear that the said intervening proceedings in the land department were rigidly and properly construed by that department to operate as a supersedeas of the decision of May 28th, 1895.

Second. Abandonment of Tract in Controversy by Election of Kohnyo Claimant.

We now come to the other question discussed in this division of counsels' brief. Here again

counsel have consumed upwards of six pages in the citation of authorities to show that abandonment of a mining location is a question of intention, and that this intention should be evidenced by some affirmative act; also to show that the burden of proving abandonment is upon the party asserting and relying upon the same. With counsels' authorities and with the above conclusions drawn therefrom we have no quarrel. We say, as we said in our opening brief, that the record in this case establishes the fact of abandonment not merely by a mere preponderance of proofs, but beyond a possible doubt.

We do not here propose to repeat the argument made in that brief, nor will we multiply authorities upon legal propositions upon which there is no controversy between appellee's counsel and ourselves. We merely pause long enough to briefly recall attention to the facts upon which we rely as showing such abandonment, and apply to them the conceded legal principles.

Counsel say that we place our main reliance upon the proposition that the filing of Exhibit "H" in the Land Office was an abandonment of the southerly tract of the Kohnyo location. They are correct in this assertion. That is, we maintain that said southerly tract did not revert to, or become a part of the public domain, after having been covered by the Kohnyo location until Exhibit "H" was filed in the Land Office; the decision of the Secretary of Interior affirming the decision of

the Commissioner, dated May 28, 1895, upon which the Scorpion attempted location was evidently based, not having operated to produce this result.

It is difficult to comprehend the drift of counsels' ideas upon this subject. They seem inclined to apply to the abandonment of a mining location the principle that would be applied to the loss of a fee simple title to a piece of agricultural land. If we are not correct in this suggestion, we cannot account for the following quotation from Washburn on Real Estate, at page 86 of their brief:

"It is probably, therefore, not too strong a conclusion to assert that in no case can a man lose his title to a freehold in land by an act or oral declaration of abandonment unless it comes within the category of estoppel."

What this question, or the doctrine announced by it, has to do with the abandonment of a mining location, we cannot discover. Surely counsel have been practicing mining law too long in Colorado, not to be aware of the distinction in this respect between the two interests in land. That a mining claim to which patent has not issued, and which is held merely by virtue of possession, together with the performance of certain acts of location can be abandoned more easily than title to a freehold estate in agricultural land, counsel most assuredly have no thought of denying.

Again counsel say, at page 81 of their brief:

"To acquit himself (appellant) of this burden, appellant is then bound to prove a

concurrence of the intention of the Kohn-
yo claimant to abandon this tract, and the
claimant's actual corporeal desertion
thereof."

This is putting the requirements in relation to abandonment very strong, to say the least. In our judgment they are too exacting. Undoubtedly there may be declarations and acts, by the locator, which, without an "actual corporeal desertion," would be held to constitute an abandonment, especially where another has acted upon the strength of such declarations and acts. And where the locator has expressed his intention to abandon by such an affirmative act as is shown in this case, the abandonment will be considered as established in the absence of proofs showing a revocation or attempt to revoke by such locator. To say that, in a controversy between third persons claiming the ground abandoned, to make a *prima facie* case additional proofs must be adduced showing the actual physical desertion of such ground by the former locator, *supplementing his specific written relinquishment sworn to and filed in the land office*, would be a most unreasonable requirement.

But the record in the case at bar is amply sufficient to meet even counsels' unreasonable demand in the premises. When the Kohnyo claimant filed in the land office "Exhibit H", in which it elected to retain the northerly end of that claim and go to patent therefor, that election, *construed as it should be with reference to the commissioner's*

order of May 28th, 1895, necessarily constituted or resulted in an abandonment of the southerly portion of said claim. But counsel are nothing if not technical; they ask how "Exhibit H" can constitute an abandonment of the southerly tract of the Kohnyo claim when that tract is not even mentioned therein; and they further ask if there is anything in "Exhibit H" tending to show, either "directly or inferentially", that The Cripple Creek Mining Company "actually deserted the southerly tract of the Kohnyo claim."

It is difficult to answer such a question, under the circumstances here presented, with gravity. In so far as an express statement in "Exhibit H", that the southerly tract was relinquished, is concerned, we reply that such express statement was wholly unnecessary in view of the decision or order of the commissioner, to which order "Exhibit H" was responsive; such a declaration would have been entirely superfluous. When the commissioner said, you may choose which tract you will retain and patent and the entry will be canceled as to the other tract, the selection by the Kohnyo claimant of the northerly tract was as much a declaration of relinquishment or abandonment of the southerly tract as if specific words had been incorporated announcing such relinquishment or abandonment.

To the other branch of counsels' question, we reply that, if it were necessary for this record to show "an actual desertion" of the southerly tract

of the Kohnyo, their client has furnished amply sufficient proof on the subject. Appellee evidently considered that this tract had actually been *corporally deserted* by the Kohnyo claimant; for, prior to the filing of "Exhibit H" in the land office, he attempted to relocate this ground as the Scorpion claim. Under the law, as we have seen, only unoccupied public land is subject to location; and we may very properly point to this attempted Scorpion relocation as sufficient evidence that the ground was physically unoccupied, in the absence of proof to the contrary. We might, by reference to other matters in this record, reinforce our position in relation to physical desertion, or to physical occupancy.

We cannot conceive of any more clear or efficient manner of indicating an intention to abandon, together with an actual abandonment, than appears in the record before us. Usually abandonment of mining ground takes place by the parties simply leaving the same, quitting the possession thereof; or by some mere verbal declaration of an intention to relinquish, coupled with failure to continue the possession and development. But, in this instance, the Kohnyo claimant files a written declaration in the land office, where the entry was made, asserting, in language so plain that it cannot be mistaken, both the intention to relinquish and the relinquishment of the southerly tract of the Kohnyo location, and also the waiver of the privilege given by the commissioner to retain said

tract; already an attempt has been made to relocate this tract, by appellee, as the Scorpion, and the filing, by the Kohnyo claimant, of its election is speedily followed by the relocation, by appellant, as the Hobson's Choice; while at a later date a third relocation of the ground is attempted under the name of the P. & G. claim; the record *does not show any effort on the part of the Kohnyo claimant whatever to recall its relinquishment or to reoccupy the ground.*

With all due respect, we suggest that it is only a diseased imagination that could avoid the conclusion, both as a matter of fact and of law, of abandonment from these acts, declarations and circumstances. If the Kohnyo claimant had, after filing "Exhibit H" in the land office and thus giving notice to all the world of its intention and of its execution of such intention, attempted to retake, or even to relocate this piece of ground after another had entered thereon and begun the initiation of a right thereto, no one would have been swifter to denounce such fact as a fraud and in violation of all principles relating to mining law than would the learned counsel of appellee.

We say, therefore, in conclusion, upon this branch of the case, and upon this division of counsels' argument, that the two propositions upon which we rely and which were questioned by them are established beyond any sort of reasonable contradiction. That is to say—we reassert that the proceedings in the land department during the three

years subsequent to the entry of the commissioner's order of May 22nd, 1895, did constitute a supersedeas or suspension of the operation of that order so that it became operative and final only upon the rendition of the judgment of affirmance, by the Secretary of the Interior, on the 7th of May, 1898; and we also reassert that the filing of "Exhibit H," especially when taken in conjunction with other matters appearing in this record, constitute a voluntary abandonment by the Kohnyo claimant of the southerly tract of that claim; and that then, for the first time after the original location of the Kohnyo, did that tract revert to and become a part of the public domain. And, finally, we repeat the inevitable conclusion that, since the Hobson's Choice was the first location of the ground made after such abandonment, it was valid and its owner entitled to a decision in his favor.

Counsels' Kohnyo Patent Criticism.

In our opening brief we refer to the fact that a patent finally issued for the north end of the Kohnyo location in pursuance to the order of the Commissioner of May 28th, 1895. We made this reference as in and of itself alone demonstrating the abandonment of the southerly end of the Kohnyo. Counsel gleefully call attention to the fact that the stipulation and exhibits do not affirmatively show the actual issue of the Kohnyo patent. This is strictly in line with their persistent endeavor to defeat our rights upon the merest and

shadowiest technicalities. They do not deny that this patent did actually issue; they are here again attempting to make use of an insignificant and at most an inadvertent omission from the stipulation of a fact that was not in any manner controverted by either side during the trial.

But, if we concede to them whatever satisfaction there may be in grasping at this straw, it does not aid them. For, as we have already seen above, it is wholly unnecessary that the Kohnyo patent to the north end of the claim should have actually issued, or that the stipulation should have included the fact of such issuance. We have demonstrated the abandonment of the tract in controversy by the Kohnyo claimant in the last foregoing pages of this brief, by the declarations and acts of such claimant, together with the acts of the parties to the present controversy, so plainly and fully that nothing more is necessary. And while the issuance of the patent to the northerly Kohnyo tract would be an additional fact bearing upon this question, no reliance whatever upon such fact by us is required.

Responding to the stringent and technical rule touching what is necessary to constitute abandonment urged by counsel, we call attention to the following declarations by Mr. Lindley.

In Section 644 of his work, he says:

"Abandonment is a question of fact to be determined by the jury. *No arbitrary rule can be laid down which will satisfy all cases.* The question being one purely of

intent, the fact is to be determined by the acts and conduct of the party. Upon a question of abandonment, *as upon a question of fraud, a wide range is allowed*, for it is generally only from facts and circumstances that the truth is to be discovered."

And again, in concluding the section, he says:

"Abandonment may also be proved by the acts and conduct of the party even against his express declarations to the contrary."

In the case at bar, as we have seen, the Kohnyo claimant not only filed in the United States Land Office an express and sworn statement in writing effectually relinquishing all claim to the southerly tract—the tract in controversy here—but he has never since made any claim to this tract, or any objection of any kind whatever to its occupancy and attempted relocation by the three different parties to the present controversy.

But we have said more than enough upon this subject, and we therefore leave it.

III.

APPELLEE'S AFFIRMATIVE ARGUMENT.

The remaining portion of appellee's brief is devoted to the affirmative branch of his argument. The previous ninety pages are consumed with a discussion of the two alleged omissions from the stipulation of facts, and a reply to our arguments that the operation of the Commissioner's order of

May 28, 1895, was superseded during the subsequent proceedings in the Land Department, and that the southerly tract of the Kohnyo claim was abandoned by the act of filing Exhibit "H" and other acts shown by the record.

The fact is that appellee, when he attempted to make the Scorpion location, did not doubt either the validity of the Kohnyo location, or the segregation by that location from the public domain of the southerly end of the claim. The belief of appellee at that time is shown by his acts; he assumed that the decision of affirmance by the Secretary of the Interior, on May 7, 1898, operated to restore this tract to the public domain, for six days later he hastened to relocate the same as the Scorpion; on July 15th following, the very day on which the Kohnyo entry *was formally canceled* as to the southerly tract, he filed an amended location certificate of the Scorpion.

Moreover, at the time of the preparation of the stipulation of facts in this case, the question discussed by the parties was as to which date the ground in controversy reverted to and became a part of the public domain. Did this result from the final decision of the Secretary on May 7, 1898; or did it result from the filing by the Kohnyo claimant, in the Land Office, of its election to retain the northerly tract and hence to relinquish the southerly tract, on June 14, 1898; or, finally, did such restoration to the public domain take place only upon the formal cancellation of the entry by the Land Office, on July 15, 1898?

Our object in recalling the court's attention to these matters, which are considered in our opening brief, is twofold: *first*, to show how, during the pendency of this cause in the courts, counsel for appellee have shifted their position and are now taking their stand and making their fight upon lines altogether different from those originally contemplated; and, *second*, to bring out clearly the fact that they have wholly abandoned the view that *the decision of the Secretary of the Interior operated to restore the tract in controversy to the public domain*. Throughout their ingenious and exhaustive brief they make no allusion to or reliance upon that proposition.

**First. Filing of Scorpion Amended
Location Certificate Availed Nothing.**

At page 115 of counsels' argument, they refer very briefly to their amended location certificate above mentioned, filed on the 15th of July, '98; they cite the state statute in relation to the amending of defective location certificates, the taking in of portions of abandoned claims, etc., and then claim that that statute aids the imperfect location of the Scorpion.

Responding to this specific contention, we say: *first*, that the filing of the amended location certificate could not and did not cure the defect arising from the fact that the discovery shaft of the Scorpion was upon ground covered by the Kohnyo,

a valid and subsisting location at the time that shaft was sunk. The case of *Armstrong v. Lower*, *supra*, and other cases, clearly demonstrate that under such circumstances the sinking of the discovery shaft *is a nullity* in so far as giving any legality or strength to the location is concerned. And before this ground could be relocated, after it became public domain, not only was it necessary to file an amended location certificate of the Scorpion, but it was also necessary to *sink a new discovery shaft, or to sink the old discovery shaft at least ten feet deeper*. This latter act was not done; there is no pretense of any attempt to perform it.

But, *second*, another vital and all-sufficient reason why the filing of this amended certificate of the Scorpion on July 15 could not and did not operate to perfect the Scorpion location, is that the Hobson's Choice had previously been located upon this ground. The ground in controversy did not revert to the public domain until the abandonment thereof, on June 14, '98, by the filing in the Land Office of Exhibit "H," and the Hobson's Choice location, made ten days later, was valid; therefore even if the Scorpion invalid location could otherwise have been made legal by the filing of the amended certificate on July 15, the Hobson's Choice location created intervening rights in favor of a third person which would certainly prevent such effect.

It is surely not necessary to cite authorities to this court upon these propositions; they are so

familiar and well known to mining lawyers as to render such citation superfluous.

Appellee's Doctrine of Relation.

At this point we might as well refer, in passing, to counsels' remarkable contention beginning at page 110 of their brief, that in some mysterious manner the formal order of cancellation of the Kohnyo entry made on July 15, 1898, related back to and became effective from the date of the Commissioner's order, to-wit, May 28th, 1895; so that at the expiration of sixty days after said May 28th, the tract in controversy must be held to have reverted to the public domain and become subject to relocation.

In view of what has already been said in the present brief on the subject of the suspension of the Commissioner's said order, it is certainly not necessary for us to dwell upon this proposition at any length. The Commissioner's order or judgment was, by its express terms, not to become operative until the Kohnyo applicant made his election or until the expiration of sixty days from said May 28th. This judgment of the Commissioner was, as we have seen, very different from the ordinary judgment holding an entry for cancellation where nothing further is to be done except to review the correctness of the decision, by its own terms this judgment was not final as to the particular tract—the northerly or southerly—to be ultimately relinquished. Had the applicant

so elected, he might have retained the southerly tract—the one here in controversy—and in that event, the northerly tract would have been canceled.

It requires no trained intellect, and no extended experience with mining law to discover the difference between the Kohno order and the kind of orders referred to by Lindley at Section 772, upon which counsel rely in this connection. The phrase, "held for cancellation," as there employed by Lindley, refers to ordinary cases where, upon the ground of fraud or of some other fatal objection, the Commissioner has absolutely and positively decided to cancel the entry or a portion of it; it does not refer to cases where the Commissioner has not so decided, but has, on the contrary, given the claimant the right of election to hold and go to patent for the specific tract.

Again, this reliance of counsel fails because, as we have fully seen heretofore, the said judgment or order of the Commissioner of May 28, did not become final until the decision of the Secretary on May 7, 1898. And the time within which the Kohno claimant was authorized to make his election as to which tract he would proceed to patent was extended by the action of the department itself until sixty days from said last mentioned decision by the Secretary.

There is nothing, therefore, in this position, when examined and understood, with reference to the facts in the present case. Its introduction into

this argument only tends to show how difficult it is for counsel to find something upon which to maintain themselves in this court.

Appellee's Last Reliance, Considered.

Realizing the inherent weakness of their cause and the inadequacy of arguments resting upon the assumption of a valid location by the Kohnyo claimant of the ground in controversy, counsel again turn their batteries against that claim. We have considered their assertion that the record does not show the validity of that location. They now execute a flank movement. If we understand them rightly, they say that—admitting the Kohnyo location to have been valid, nevertheless *it could not legally cover or include the southerly end of that claim.* Their argument is that in this regard the Land Department misunderstood or misapplied the law; that any attempt to cover by a single lode location two tracts that are segregated by the corner of a placer claim is unlawful and futile. And hence that the tract here in controversy always remained a part of the public domain, until staked and occupied as the Scorpion. Our answer to this position is twofold:

Second: Territorial Extent of Kohnyo Location Res Judicata and not Subject to Collateral Attack.

A full and complete answer to this branch of

the argument of counsel is that the matter they seek to discuss is no longer an open question. The action of the Land Department with reference to the Kohnyo claim is conclusive—it cannot be questioned in the present controversy.

There is no doubt but that this territory was, under the land laws, subject to sale, and the full jurisdiction of the Land Department in connection therewith must be conceded; it follows, therefore, under the universal current of authority that the decision of the Land Department pertaining to the regularity of its occupation and purchase was final and conclusive; this is especially true since there was no attempt to re-examine or review in the courts the action of that department *in connection with the Kohnyo location and patent proceeding*.

Our position is that since the Land Department having full and plenary jurisdiction, treated the Kohnyo claim as a valid location in so far as both ends of that claim were concerned, and throughout the hearings and decisions up to and including the final determination, held the same to be a valid location, it is not permitted to counsel in the case at bar, which is wholly separate and independent controversy between different parties and involving different questions, to challenge either the validity of the Kohnyo location *or the territorial scope of that location*. When the Commissioner of the General Land Office on the 28th of May, 1895, investigated the subject of

the Kohnyo location in connection with its patent proceedings and made his finding and determination with reference thereto, giving the Kohnyo applicant the privilege of selecting either end of the claim and proceeding to patent thereon he pronounced in favor of the validity of the location as to both ends of the claim as plainly as it he had covered pages with express and repeated declarations of such validity. It would be absurd to suppose that he would give the Kohnyo applicant permission to *retain and patent the southerly end of that claim unless that southerly end was sufficiently covered by the original location*; and the fact that he extended the privilege of choosing and patenting the tract here in controversy, is conclusive that to his mind and under the law as he understood it, the original Kohnyo location included that tract.

Moreover, in all of the subsequent proceedings before the land department, as we have seen, extending through a period of three years, this view of the commissioner was accepted and sanctioned; and finally at the end of the period, by the decision of the Secretary of the Interior on the 7th of May, 1898, this construction was confirmed by the highest authority in the Department. For by that decision the right of the Kohnyo applicant to make his choice of the southerly end of the claim and proceed to patent therefore is re-affirmed, just as announced by the Commissioner three years before.

For a further confirmation of this view regarding the Kohnyo location, we recall attention to two additional acts of the land department, viz: The receiving, acceptance and full recognition of Exhibit "H", in which the Kohnyo claimant expresses his choice to retain the northerly end of the claim and go to patent therefor, and the formal cancellation on the 15th of July, 1898, of the Kohnyo entry as to the tract here in controversy; if the entry did not include this tract why make such cancellation?

At the date of the attempted Scorpion relocation, therefore, the Kohnyo claimant had a right to go to patent upon the tract in controversy here. He still had and for weeks thereafter retained the right to patent this tract as the Kohnyo. This he could not do if the tract were public domain; for the law requires a valid location precedent to patent. Under these circumstances it would be absurd to claim that the Scorpion location was legal.

Counsel cannot be permitted at this time and in this way and in a controversy between the present parties, to review or challenge or in any manner call in question the correctness of those land department rulings for the purpose of having them annulled or disregarded as to the ground in controversy; this is an absolutely separate and distinct proceeding between other and different parties having no connection in any manner whatever with the Kohnyo proceeding for patent. To permit the present attack would be no more excusable than to

permit the regular and valid proceedings and judgment in a suit at law between A and B to be called in question in a subsequent, separate and distinct suit at law between C and D. Even if the land department were mistaken in its view of the law, and even if counsels' contention were true (which we do not admit) and the two ends of the claim thus segregated could not legally be included within one location, yet in the present controversy counsel are estopped; they cannot be permitted to raise the question, any more than they could be allowed to collaterally attack an erroneous judgment entered by a court in an ordinary action at law.

It would seem to be hardly necessary for us to refer Your Honors to authorities upon these propositions. The law is so clear, well known and unanimously recognized. Of course, if an ordinary suit in the courts instead of the Kohno location and patent proceedings before the land department, were here involved, counsel would not for a moment think of presenting this argument; but, as we have already suggested, there is a little, if any, difference between the two cases. The action of the land department in matters within its jurisdiction is just as conclusive and binding and impervious to collateral attack as is judicial action by one of the ordinary and usual judicial tribunals.

The Authorities.

Says Mr. Justice Field, in *Steel v. Smelting Co.*, 106 U. S., at page 450:

"We have so often had occasion to speak of the Land Department, the object of its creation and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, *the acts he has performed to secure the title*, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

The same learned Judge, in *Smelting Co. v. Kenp*, 104 U. S. 640, employs the following language:

"That instrument (the patent) duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law is entrusted *that all the requirements preliminary to its issue have been complied with*. The presumptions thus attending it are not open to rebuttal in an action at

law. It is this unassailable character which gives to it its chief, indeed its only, value as a means of quieting its possessor in the enjoyment of the lands it embraces."

Decisions to the foregoing effect might be indefinitely multiplied. These decisions, it is true, speak of instances where the patent has issued. But the principle of *res judicata* or freedom from collateral attack announced is equally true where final entry has been made. The receiver's receipt indicates the final judgment of the land department upon all preliminary matters just as fully as does the patent. The patent itself only puts in a different form the evidence of such determination.

Says Mr. Lindley, in Section 208:

"The final certificate issued by the receiver of a United States Land Office after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held *to be the equivalent of a patent*."

And again, in the same section, he says:

"Generally speaking and for all practical purposes, the issuance of the final certificate to an agricultural entryman closes the case, *and no collateral attack on the certificate so issued is allowed*."

It is hardly necessary for us to add that in this particular there could be no distinction between the final certificate to agricultural land and the final certificate to mineral land.

It is true the patent did not issue to the Kohnyo claimant for the tract of ground here in

controversy. It is also true that the final entry of that piece of ground was ultimately canceled; but such cancellation *did not rest upon any fraud, defect, or inherent weakness in the original location* which rendered the same illegal or void, or in the patent proceedings and entry. On the contrary, as we have seen, the land department throughout held all of these proceedings *sufficient to entitle the Kohno claimant to proceed to patent for this particular tract*. If this were not so, that department could not and would not have authorized the Kohno claimant to make his election and to retain this particular tract.

Our position therefore, is that the entry should in the present action be regarded as covering the tract in controversy and as segregating it from the public domain until the point of time when the Kohno claimant saw fit, by making his election, to abandon that tract. *By this act, and by this act only, did he waive his right to patent this tract and express his election to permit the receiver's receipt to be canceled in relation thereto.*

It will be observed that we do not rely upon the formal cancellation of the receiver's receipt by the land department. Had there been no provision authorizing the Kohno claimant to make the election mentioned, the receiver's receipt would have been sufficient to protect the ground from re-entry until the date of cancellation. But, in view of the authority given by the Commissioner in his decision, to the Kohno claimant to make his elec-

tion between the two tracts undoubtedly the latter's act in filing Exhibit "H" must be construed as a relinquishment of all claim to the tract here in controversy, and as restoring the same to the public domain.

The subsequent formal cancellation of the entry did not itself operate to restore this tract to the public domain. So much counsel concede.

To the authorities cited in our opening brief upon the last question we add: *Rebecca Gold M. Co. v. Bryant*, a very recent decision by this Honorable Court; it is reported in 71 Pac., page 1110. The cancellation of the receiver's receipt in the instance here under consideration did not change the status of the ground; it merely expressed in a formal manner and placed of record the prior fact of abandonment and restoration to the public domain.

Third. Kohnyo Location Did Include Southerly End of Claim.

It is clear from the foregoing argument and authorities that appellee will not now be heard to question the sufficiency of the original Kohnyo location as to the ground here in controversy. But if this were not so, and if that were still an open question, and the attempt to present it were not a collateral attack, counsels' argument fails to demonstrate that the construction of the law by the Land Department in the premises was erroneous.

They admit the correctness of the view taken

in *Armstrong v. Lower*, 6 Colorado, and in other cases, that when the various acts of location required by law have been performed, the presumption obtains that the vein extends throughout the claim lengthwise. But they say that this presumption was overcome by the interposition of a portion of the placer ground between the two ends of the Kohnyo; from this fact they infer that the continuity of the Kohnyo vein was destroyed, and therefore the location never rightly included the southerly end of that claim.

In their discussion of this subject we note two singular circumstances, viz: Among the land decisions they cite only the following cases: *Andromeda Lode*, 13 L. D. 146; *Mabel Lode*, 26 L. D. 675; and *The Bimetallic Mining Company*, 15 L. D. 309. The first two of these decisions are cases where the lode claims were segregated *by millsites*; in the remaining case such segregation was caused *by agricultural land*; these cases, therefore, are not analogous to the case under consideration for the reason that the Kohnyo was thus segregated *by the corner of a placer claim*.

As we shall presently see, the foregoing distinction may be very material. The millsite and the agricultural land are, of course, non-mineral; while the placer claim is and can only be entered as mineral ground. The law does not recognize in any manner the existence of a lode or vein in either agricultural land or millsites. On the contrary, the existence of veins in placer ground is a

matter of common and frequent occurrence, and even the statute itself clearly recognizes such existence. Not only this, but under certain conditions a placer patent does not cover or convey a vein within the placer—such vein remaining, notwithstanding the patent, and notwithstanding there be no adverse proceeding, a part of the public domain and subject to location and entry by a third person. This condition takes place whenever the placer applicant, at the date of his application for patent, knows of the existence of the vein in the placer ground, but makes no effort to cover the same himself by a valid lode location.

It logically follows, therefore, that while counsels' contention to the effect that a patent to a millsite or to agricultural land may be treated as tending to show that there is no mineral vein within the territory, is probably correct, their conclusion in the present case is not a necessary or even a reasonable sequence. The Kohnyo was not segregated by agricultural land or a millsite; it was segregated by the corner of a placer claim; we may very reasonably infer that the Kohnyo vein did extend through the placer. Certain it is that the issuance of the placer patent ought not to be treated as any evidence whatever that the Kohnyo vein did not exist in the Mt. Rosa placer. But if it be not treated as such evidence, there is nothing in the record to overcome the presumption of continuity of the vein, established by *Armstrong v. Lower*, and other cases.

At this point we call attention to the other singular circumstance connected with counsels' discussion. They make a curious mistake as to the issue tried by the land department after the Commissioner's order of May 28th, 1895. They assume and state in at least half a dozen different places that the question considered in those proceedings was, whether or not the Kohnyo vein *existed* in the intervening corner of the placer claim. In this they are radically mistaken. The question was not, did the vein exist in that ground? It was, did the placer applicant at the date of his application for patent *know that it existed* within that ground? There is not one word in any of the proceedings in the land department showing or tending *to show that the vein did not exist in the placer*, or that the fact of its existence therein was even considered; if any inferences could be drawn from the language of the different decisions on the subject, it would be that the vein *did exist* in the placer; the sole and only issue tried was confined to the question whether the placer applicant at the date of his application *knew* of the existence of the vein in placer ground. The broadest scope that can be given to the result of those proceedings is that they simply determine that the placer applicant *did not know* at the date of his application for patent of the existence of the Kohnyo vein within placer ground.

There is, therefore, logically and in reason no difficulty about applying to the present question

the doctrine of the Armstrong-Lower case; it is not correct to say that the presumption recognized in that case was overcome by anything connected with the Kohnyo proceedings; on the contrary, it would seem to be only reasonable and proper to treat that presumption as applicable notwithstanding such proceedings. So that (discussing this matter from the standpoint of counsels' argument) if the question could properly be considered in the present controversy, the burden was undoubtedly upon appellate to show that the Kohnyo vein did not extend into or through the southerly end of that claim, which is the ground here in controversy; he offered no proof upon this subject; he did not in any manner discharge or attempt to discharge the burden that was upon him in this regard. And if this branch of the case rested upon the propositions considered by counsel, they have failed to sustain themselves.

Further land decisions considered.

Disclosing the distinction we have made above as to mineral and non-mineral land, we have only to refer to the extract from the Mabel Lode case quoted by counsel at page 99 of their brief, which is as follows:

"Where a lode or vein abuts upon *non-mineral land*, there is no authority of law for including in a location made on such lode or vein any ground beyond such abutment, and certainly not to embrace land lying beyond the *non-mineral tract*."

Your Honors will observe how carefully the conclusion of the department regarding the exclusion of a segregated portion of the vein is limited to the case of the intervention of *non-mineral land*. But if we were to assume that the Mabel Lode and other cases relied on by counsel were, notwithstanding the fact that they deal with non-mineral interferences, to be treated as on the same footing as the Kohnyo Mt. Rosa placer interference, then we say that whatever there may be, if anything, inconsistent between the declarations contained in those cases and the declaration of the department in the Kohnyo case must be resolved in our favor. Because if these cases are analogous, the Kohnyo, being much the later one, construes, supersedes or modifies the earlier ones. And unquestionably the view adopted in the Kohnyo case is, as we have seen, that the presumption exists of the continuity of the Kohnyo vein beyond the placer interference and into the tract in controversy, and hence the sufficiency of the location as to that tract, obtains. And the law as established by the Kohnyo decision undoubtedly is that the location may include and the claimant may patent that portion of the lode claim which *lies beyond the interfering placer territory*.

Nor does the Kohnyo decision stand alone in this regard; the view of the land department adopted in that decision has been since recognized and re-declared. Moreover, this view has been broadened or extended, and it has been applied

even to the case where the segregation was caused by non-mineral land, to-wit, a millsite. The case of the Paul Jones Lode, 28 L. D 120, was determined in 1899, nearly four years subsequent to the determination of the Kohnyo matter. The Paul Jones Lode was cut into two single tracts by the Gladstone millsite; this case, like the Kohnyo case, was first passed upon by the Commissioner, and several years later by the Secretary of the Interior. The Commissioner held that both ends of the Paul Jones Lode could not be patented, but that since

“much the greater part of the Paul Jones Lode claim lies southeasterly from said millsite, claimant may, if he so desires, retain that portion of his claim, providing he can show a discovery of mineral thereon, and that five hundred dollars have been expended in labor or improvements upon that part of said claim,”

and the applicant was allowed thirty days with which to elect which end of the claim he would patent.

In his decision the Secretary of the Interior, after reviewing the case, concludes:

“There appears to be no error in your official decision of November 14, 1893, holding that the Paul Jones quartz lode mining claim could only stand for one or the other of the two parts, and giving the claimant the privilege of retaining the larger portion by showing a discovery of mineral thereon, and that five hundred dollars in labor or improvements thereon had been expended.”

And, singularly enough, the learned Secretary declares that this conclusion and decision are supported by the three cases above mentioned, cited by counsel in their brief.

It follows, therefore, that counsel for appellee in the case at bar, in attacking that portion of the Kohnyo location which gave the applicant a right to choose and patent the southerly end of the claim are confronted with another and later decision of the Land Department clearly recognizing and re-affirming the view they challenge.

We are content to risk without further discussion the position taken by the Land Department in these two decisions. The contrary view of counsel, unsupported by authority, that the Commissioner arrogated to himself a power he did not possess, and that both he and the Secretary of the Interior recognized a radically erroneous principle when they allowed the Kohnyo claimant to choose the southerly portion of the claim and proceed to patent therefor, will hardly be accepted by this or any other court.

We close this brief with the quotation, although it is hardly necessary, of a few extracts from Mr. Lindley.

In Section 413 of his work, the learned author says:

“On the other hand lodes found within the placer surface or underneath it, if their existence is known prior to the application for placer patent, are not the subject of a placer grant. * * * The issu-

ance of a placer patent containing within its limits a lode known to exist prior to the patent application, which lode is not claimed and applied for by the placer claimant as as a *lode*, does not cut off the right to appropriate it in hostility to the patentee. His failure to include it in his placer application is a conclusive declaration that he had no right to it.

Commenting upon the fact that in placer proceedings the Land Department requires a couple of affidavits to the effect that there are "no known lodes within the placer," and declaring such requirements superfluous, Mr. Lindley, at Section 703, further says:

"It is not a fact necessary to be determined in such proceeding. If such a lode existed, although not located at the time of the filing of the application for a placer patent, it is reserved by operation of law, notwithstanding any adjudication made by the Land Department in the placer proceeding."

And again, in commenting upon the fact that there need be no adverse for a known lode against a placer application for patent, Mr. Lindley, at Section 720, says:

"Where the existence of the lode is known and the placer applicant fails to assert his right to it by including it within his application, such failure is a conclusive declaration that he has no right to the possession of the vein or lode. There would be nothing in such an application which would call for any contest upon the part of the lode claimant. The owner of

the known lode, if it were a located one, could not be considered as asserting anything adverse to the placer claimant. We think it well settled that such lode claimant need not, under such circumstances, institute adverse proceedings against the placer application."

We think that we have now answered all the material arguments presented by counsel for appellee in their ingenious and exhaustive brief. We still confidently believe in the correctness of our positions and in the justice of our assertion that appellant—the owner of the Hobson's Choice lode claim—ought to succeed in the present controversy. And we repeat our request that a judgment be entered or directed by this court accordingly.

After a careful consideration of the arguments, printed and oral, made on behalf of both parties, the Supreme Court of Colorado entered judgment for defendant in error Gurney, (appellant in that court), and we respectfully submit that that judgment was in accordance with the law and should be affirmed.

Respectfully submitted,

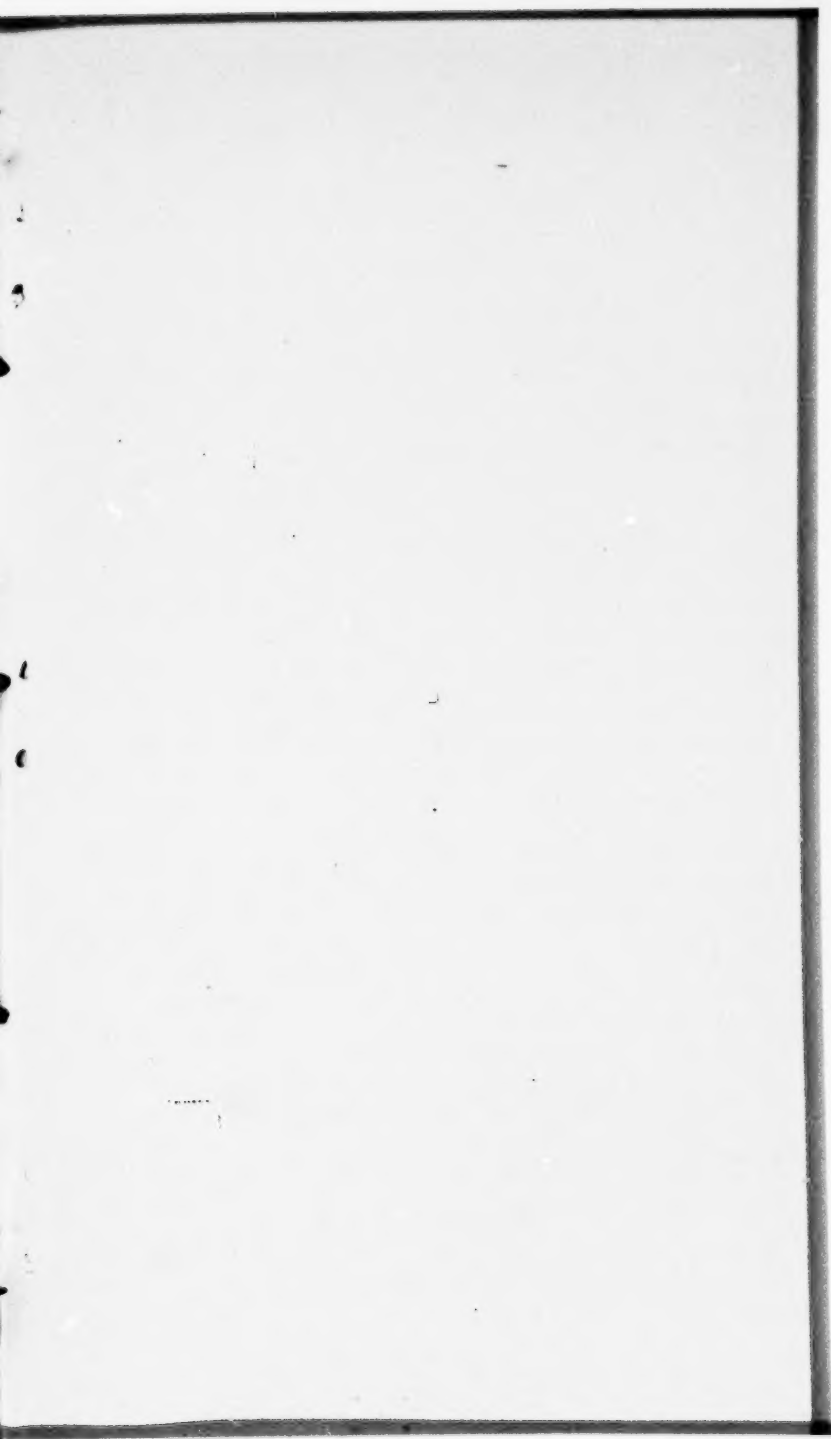
CHARLES C. BUTLER,

Attorney for Defendant in Error.

Bi-Metallic Bank Building,

Cripple Creek, Colorado.

November 17, 1905.





Supreme Court of the United States.

Nos. 97, 98 and 99.—OCTOBER TERM, 1905.

97 Frank Cole Brown, Plaintiff in Error,
vs.
Charles Duncan Gurney.

Josiah Appleton Small, Plaintiff in Error,
98 vs.
Frank Cole Brown.

99 Frank Cole Brown, Plaintiff in Error,
vs.
Josiah Appleton Small.

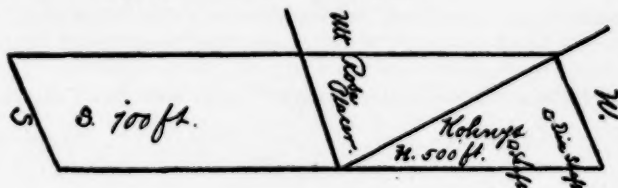
In error to the Supreme
Court of the State of
Colorado.

[April 2, 1906.]

Brown applied for patent on a mining claim, known as the Scorpion, and Gurney adversed this application as the owner and claimant of the Hobson's Choice, as did Small, also, as the owner and claimant of the P. G. claim. Thereafter each brought suit in support of his adverse claim in the District Court of Teller County, Colorado. The cases were tried together on an agreed statement of facts. This showed that the Scorpion, Hobson's Choice and P. G. locations covered substantially the same tract of ground, and were all made in compliance with law, with the exception repeated in connection with each of said locations: "*Provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain.*"

It appeared that prior to May 28, 1895, a mining lode location called the Kohnyo was owned by the Cripple Creek Mining Company, which claim was divided into two non-contiguous tracts by the Mt. Rosa placer claim. The north end of the Kohnyo, comprising five hundred feet of the claim, was where the discovery of mineral was made, and it also contained a discovery shaft and the other workings and improvements of the claim. The south end being seven hundred feet in length, did not show mineral, and was without development work of any kind.

The following diagram illustrates the situation:



The local Land Office permitted the claimant of the Kohnyo to enter the two tracts as one claim, but the Department ultimately refused to issue a patent for such tracts, basing the refusal upon the ground that two portions of a lode mining claim, separated by a patented placer, could not be included within one patent. The Land Office gave the applicant, however, the privilege to apply for a patent upon either of the segregated tracts, and directed that, in default of an election or appeal by the claimant within sixty days from the date of the order, the entry of that portion of the claim lying south of the Mt. Rosa claim should be cancelled without further notice. This decision was rendered May 28, 1895, and no appeal was taken from it; but the claimant of the Kohnyo instituted proceedings against the claimant of the Mt. Rosa placer, the purpose of which was to secure title to the vein of the Kohnyo, which, it was claimed, passed through the portion of the placer claim which conflicted with the Kohnyo location. These proceedings were prosecuted before the Land Department, with the result that on May 7, 1898, a decision was rendered against the Kohnyo claimant's contention of a known vein in the placer conflict.

June 14, 1898, the claimant of the Kohnyo filed in the Land Office a written instrument, dated June 10, by which it elected to retain and patent the north end of the Kohnyo claim, and in which it also waived any right to further question or review the decision of the Secretary of the Interior of May 7, 1898, affirming the decision of May 28, 1895.

July 15, 1898, the Commissioner of the General Land Office cancelled the entry of the Kohnyo claim as to that portion south of the Mt. Rosa placer.

May 13, 1898, Brown located this seven hundred feet as the Scorpion lode claim. June 23, 1898, Gurney located the same premises as the Hobson's Choice lode claim, and July 16, 1898, Small located the same ground as the P. G. lode claim. July 15 and 16, 1898, the claimant of the Scorpion filed amended and second amended certificates.

On these facts, judgment was rendered for defendant in each case, from which plaintiffs appealed to the Supreme Court of the State. That court reversed the judgment in *Gurney v. Brown*, and entered judgment that Gurney recover the premises included in the Hobson's Choice location, and for costs; and reversed the judgment in *Small v. Brown*, and entered judgment "that neither party has established any right to the premises in controversy," and for costs. The opinion is reported in 32 Col. 472.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The question in these cases, which was intended to be, and was passed upon, is when, in respect of the three locations, did the premises in controversy become subject to location?

In the State Supreme Court, counsel for Brown contended that the judgments below must be affirmed because the agreed facts failed to identify the premises in dispute as part of the Kohnyo claim; did not establish the validity of that location; and did not affirmatively show that the premises, when located as the Scorpion, were not part of the unappropriated public domain.

But the Supreme Court applied the rule that where the existence of certain facts is assumed in the trial court and the trial proceeds, without objection, on that assumption, and the case is decided in reliance thereon, neither party will be heard in the court of review to question there for the first time the existence of the facts, and especially not where the alleged omissions might have been supplied if called to the attention of the trial court. And properly applied it, for the identity of the ground in controversy and the validity of the original Kohnyo location were conceded by both parties; and, indeed, counsel really does not deny them as matters of fact but simply objects that the stipulation did not include them. Moreover, we think the stipulation and exhibits attached containing the various proceedings before the Commissioner of the General Land Office and the Secretary of the Interior establish the validity of the Kohnyo location. According to that record, the Kohnyo claim had passed to final entry; this entry had been recognized by the Commissioner of the General Land Office and the Secretary; the question litigated in the Land Department for something like three years, as to the knowledge of the placer applicant at the time of his application for patent of the existence of the Kohnyo vein in the placer ground, had been decided adversely to the Kohnyo claim; the Kohnyo claimant had thereupon accepted this decision, acquiesced therein, and availed himself of the privilege extended by the Commissioner's decision of May 28, 1895, and elected to retain the northerly tract of the Kohnyo claim, which amounted to a relinquishment of the southerly tract, and the entry as to that tract was thereafter formally cancelled.

It may be added also that in adverse proceedings each party is practically a plaintiff and must show his title. *Jackson v. Roby*, 109 U. S. 440; *Perrego v. Dodge*, 163 U. S. 160, 167. By the act of Congress of March 3, 1881, (21 Stat. 505, c. 140,) it was provided that if in an adverse suit "title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict." Under that act it is held that before the applicant for a patent can have judgment he must prove his claim of title to the ground. The object of the statute was, as we said in *Perrego v. Dodge*, *supra*, to provide, in the case of a total failure of proof of title, for an adjudication "that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the Land Office simply because the adverse claimant had failed to make out his case, if he had also failed." 2 Lindley on Mines, § 763, and cases cited.

Of course it is essential that at the date of a location the ground located on should be part of the public domain, and in the present case the specific question affirmatively raised was whether the ground in controversy was a part of the public domain at the time of the respective contested locations.

It seems to us that when the Scorpion locator attempted to make that location he conceded the validity of the Kohnyo location and the segregation by that location from the public domain of the southerly portion of that claim, but assumed that the decision of the Secretary of May 7, 1898, operated to restore that tract to the public domain as of that date, since he relocated it on May 13, and on the following fifteenth of July filed an amended location. But the filing of the latter certificate did not cure the defect arising from the fact that the discovery shaft of the Scorpion was upon ground covered by the Kohnyo's claim, and the filing of the amended certificate could not perfect the Scorpion location in view of the previous location of the Hobson's Choice, which created intervening rights in favor of a third person.

The stipulation of facts was evidently prepared in respect of the inquiry concerning the date at which the ground in controversy reverted to and became a part of the public domain, and that embraced the question whether that resulted from the decision of the Secretary of May 7, 1898; or from the filing by the Kohnyo claimant of its election to retain the northerly tract and relinquish the other, June 14, 1898; or upon the formal cancellation of the entry July 15, 1898.

Nevertheless it is further contended that the proceedings in the Land Department between May 28, 1895 and May 7, 1898, did not suspend the operation of the decision of the Commissioner of May 28, 1895, and since by that order the Kohnyo's applicant was required to make its election within sixty days from that date, as to which end of the claim it would retain and patent, in default of which election the entry of the southerly portion became cancelled, and the Kohnyo's claimant did not make such election until June, 1898, that the entry became cancelled as to the ground in controversy, at the expiration of sixty days from May 28, 1895, and thereupon the tract reverted to the public domain. The Land Department ruled otherwise. It treated the order of May 28, 1895, as suspended during the intermediate period, while the proceedings as to the knowledge of the placer claimant of the existence of the Kohnyo lode were pending. Manifestly because if it was known by the placer applicant at the time of application for the patent that the Kohnyo vein extended through the placer ground, then the vein did not pass by the patent, and the Kohnyo's claimant might be entitled to patent both ends of its claim, embracing the vein and a strip through the placer location.

And when on July 15, 1898, the Department cancelled the Kohnyo entry as to the tract in controversy, it was declared that: "In view of the

fact that no motion for a review of the departmental decision of May 7, 1898, affirming the decision of this office of May 28, 1895, was filed within the time prescribed by the rules of practice, the decision last mentioned became final, and it now devolves upon this office to execute the same."

The election, then, by the Kohnyo claimant, filed in the Land Office June 14, 1898, was an abandonment of the south seven hundred feet of the Kohnyo claim, which took effect *eo instanti*. Lindley, §§ 642, 643, 644; *Derry v. Ross*, 5 Col. 295, 300. This was voluntarily done, and took effect notwithstanding the receiver's receipt had not been formally cancelled. The order of cancellation of July 15 simply recorded a pre-existing fact, and did not change the effect of the previous abandonment. By reason of that abandonment the southerly tract, for the first time, reverted to and became a part of the public domain. And as the Hobson's Choice was the first location of the ground made after such abandonment, it follows that it was valid, and that its owner was entitled to a decision in its favor.

We again state the dates of the respective locations. The Scorpion was located May 13, 1898. The Hobson's Choice was located June 23, 1898. The location of the P. G. was July 16. Thus it is seen that the Scorpion was attempted to be located at a time when the premises were not subject to location; that the Hobson's Choice was located when the premises had reverted to the public domain; and that the location of the P. G. was after that date.

We have accepted the rulings of the Land Department that the Kohnyo location covered the southerly as well as the northerly end of that claim. Such was the decision of May 28, 1895, and that of the Secretary of the Interior of May 7, 1898, and the formal cancellation of July 15, 1898. In this separate distinct proceeding counsel cannot challenge these rulings. The attack is collateral and cannot be entertained. *Steel v. Smelting Company*, 106 U. S. 447; *Smelting Company v. Kemp*, 104 U. S. 636. True those decisions refer to instances where the patent had issued, but the principle of freedom from collateral attack is equally applicable where final entry has been made. The final certificate issued by the receiver after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held to be for many purposes the equivalent of a patent. We are advised in argument that the patent was issued, but it is objected that though such may be the fact it is not so stated in the facts agreed.

The cancellation of the entry of the seven hundred feet did not rest on any defect in the original location. On the contrary, the Land Department held the proceedings sufficient to entitle the Kohnyo claimant to proceed to patent for this particular tract if he should so elect. It was only when the Kohnyo claimant abandoned that tract by making his elec-

tion that he waived his right to patent it, and permitted the receiver's receipt to be cancelled to that extent.

That cancellation did not itself operate to restore the southerly tract to the public domain, which had already taken place by the action of the Kohnyo claimant in compliance with the judgment of the Land Department.

We concur in the conclusions of the Supreme Court of Colorado, and the judgments are

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

